16-579

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 122.

JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWER, PLAINTIFF IN ERROR

vs.

CORNELIUS LYNDE, JR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 23, 1879.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof on Saturday, the twelfth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY, *Clerk.*

JAMES PATTERSON FOR THE USE OF THOMAS J. BROWER
v.
CORNELIUS LYNDE, JR. } Assumpsit.

Northern District of Illinois, sct:

Be it remembered that on the 21st day of August, A. D. 1875, came the said plaintiff, by C. M. Harris, esq., his attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago, in the district aforesaid, his bond for costs and præcipe for a writ of summons in said entitled cause, which said bond and præcipe are respectively in the words and figures following, to wit:

Bond for costs.

2 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1875.

JAMES PATTERSON FOR THE USE OF THOMAS J. BROWER
v.
CORNELIUS LYNDE, JR. } Assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him. Dated this 21st day of August, A. D. 1875.

FRANCIS M. CORBY.
HENRY W. KING.
JOHN A. MARKLEY.
W. E. DOGGETT.

(Endorsed:) Filed Aug. 21, A. D. 1875. Wm. H. Bradley, clerk.

Præcipe.

Circuit court of the United States for the northern district of the State of Illinois, October term thereof, A. D. 1875.

3 JAMES PATTERSON, FOR THE USE OF Thomas J. Brower, *vs.* CORNELIUS LYNDE, JR. } In assumpsit. Damages, $76,000.

The clerk of said court will, in said cause, please issue summons.

C. M. HARRIS,
Att'y for Pl'ff.

(Endorsed:) Filed Aug. 21, '75. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 21st day of August, A. D. 1875, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, with the return of the marshal annexed thereto, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Cornelius Lynde, jr., if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of
4 the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto James Patterson, for the use of Thomas J. Brower, of a plea of trespass on the case upon promises to his damage, as it is alleged, of seventy-six thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 21st day of August, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 100th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, Wm. Payne my true and lawful deputy, to execute the annexed writ, James Patterson, for use of, &c., vs. Cornelius Lynde, jr., and to make return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

5 I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of Cornelius Lynde, jr., therein named, on the 1st day of September, A. D. 1875.

B. H. CAMPBELL,
United States Marshal.
By WILLIAM PAYNE,
Special Deputy.

William Payne being duly sworn deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

Sworn to before me this 1st day of September, A. D. 1875.

EDWARD D. SWEENEY,
United States Commissioner for the Northern District of Illinois, or Notary Public.

(Endorsed:) Filed Sept. 8th, A. D. 1875. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 24th day of September, A. D. 1875, said plaintiff by his attorney filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

Circuit court of the United States for the northern district of the State of Illinois, October term thereof, A. D. 1875.

6 James Patterson, who sues for the use of Thomas J. Brower, plaintiff in this suit, a citizen of the State of Oregon, as is said Brower, complains of Cornelius Lynde, jr., defendant in this suit, who is a citizen of said circuit and the county of Rock Island, in the State aforesaid, in a plea of assumpsit.

For that whereas in A. D. 1862 an act of said State of Oregon was passed by its general assembly or legislature entitled "An act providing for private incorporations and the appropriation of private property therefor," which was approved on the 14th day of October, A. D. 1862, when it took effect.

That sections numbered 1, 2, 3, 4, 5, and 6 of said act are as follows:

SEC. 1. Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation they may do so in the manner provided in this chapter.

SEC. 2. Such persons shall make and subscribe written articles of incorporation in triplicate and acknowledge the same before any officer authorized to take the acknowledgment of a deed and file one of such articles in the office of the secretary of state, another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on or the principal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

7 SEC. 3. The articles of incorporation as a certified copy of the one filed with the secretary of state or the county clerk is evidence of the existence of such corporation.

SEC. 4. The articles of incorporation shall specify,

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited.

2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage.

3. The place where the corporation proposes to have its principal office or place of business.

4. The amount of the capital stock of the corporation.

5. The amount of each share of such capital stock.

6. If the corporation is formed for the purpose of navigating any stream or other water or making or constructing any railway, macadamised road, plank road, dry road, canal, or bridge, the termini of such navigation, road, canal, or the site of such bridge.

SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators, and authorised to carry into effect the object specified in the articles in the manner provided in this chapter, and they and their successors, as-
8 sociates, and assigns by the name assumed in such articles shall hereafter be deemed a body corporate with power,

1. To sue and be sued.

2. To contract and be contracted with.

3. To have and use a corporate seal, and the same to alter at pleasure.

4. To purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation.

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation.

6. To make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution. Provided, that no such sale shall be made without thirty days' notice of time and place of sale in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs.

That under and by virtue of said act, and while it was in force, a private incorporation was organised and made on the 6th day of November, A. D. 1863, at Auburn, in the county of Baker and said State of Oregon, in and by the name of The Burnt River Ditch and Mining Company,
9 with a capital stock of $24,000, divided into shares of the nominal value of $100 each, establishing its principal office at or near Clark's Creek in said county, for the purpose of constructing ditches, mining, and selling water to miners and others in said county of Baker, and more particularly in the mining camps in the vicinity of Burnt River and Willow Creek in said county.

That section numbered 19 of said act is as follows:

Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose, by a

vote of the majority of the stock of such corporation, increase or diminish its capital stock, or the amount of the shares thereof, or authorise the dissolution of such corporation and the settling of its business and disposing of its property and dividing its capital stock in any manner it may see proper.

That under and by virtue of said act, and while it was in force, the then stockholders of said corporation on the 3rd day of August, A. D. 1864, at said Auburn, did increase the capital stock of said corporation to $144,000, divided into one thousand four hundred and forty-four shares.

That sections numbered 21 and 22 of said act are as follows:

SEC. 21. The stockholders may, by a majority vote of the stock,
10 change its general place of business.

SEC. 22. The directors of any corporation may file supplementary articles of incorporation at any time when a unanimous vote of all the stock subscribed shall so determine for the purpose of engaging in any new enterprise or business pursuit not in violation of law, or for the purpose of changing any part of the route of their road or canal or either terminus, or both, the directors shall cause a notice to be published of the filing of such supplementary articles setting forth the object of the same.

That under and by virtue of said act, and while it was in force, the then stockholders in said corporation on the 19th day of September, A. D. 1870, at El Dorado, in said county, did file supplemental articles of such incorporation for the purpose of changing the name of such corporation from that of The Burnt River Ditch and Mining Company to that of The Malheuer Burnt River Consolidated Ditch and Mining Company, of extending the business of said corporation to the constructing of ditches, merchandising, and lumbering in said county, of removing its principal business office from near said Clark's Creek to El Dorado, in said county, and of increasing the capital stock of said corporation to one million dollars, divided into two thousand shares of the nominal value of five
11 hundred dollars each, all which they thereupon then and there did.

That thereafter and on the 7th day of March, A. D. 1871, said defendant did subscribe to and for and take of such capital stock of said last named company two hundred shares of the nominal value of five hundred dollars each, and thereby became a member in and stockholder of said last-mentioned company, and that said last-named company thereupon entered the name of said defendant in its stock or subscription book as a member thereof and stockholder therein to the amount of two hundred of such shares, and did then make and deliver to said defendant its certificate in writing numbered two, stating that he, said defendant, was entitled to two hundred shares of the capital stock of said company of the nominal value of five hundred dollars each, and that said defendant then received and accepted said certificate.

That from the day and year last aforesaid until after the execution of the promissory note hereinafter described, said defendant caused it to be generally known in the section of the country in which said ditch is located and other places, that he was a stockholder in said last-named company and hereby enabled it to obtain credit that it otherwise could not have, and did repeatedly state to creditors of said last-named company that all its debts should be paid so soon as the water was let into said ditch,
12 stating that it would be soon, and request them to say to others

such creditors for him. All which was known to said Patterson before the execution of said promissory note and was an inducement to him to give the credit which he did to said company.

That previous to the execution of said promissory note, said Lynde had paid on the shares so held by him as aforesaid thirty thousand dollars; that he has never paid any more thereupon nor on any thereof, and now is indebted to said last-named company seventy thousand dollars with interest thereupon.

That on the 10th day of October, A. D. 1872, at said Rock Island County, to wit, at the district aforesaid, said defendant did with R. R. Cable, C. R. Chamberlain, Louis M. Buford, Edward George, and B. D. Buford, in writing, under the seal of each, acknowledged before a notary public by each of them, authorize W. S. Boswell to, as their attorney, cast all the votes to which they were entitled in any and all meetings of the stockholders of said last-named company and send it to said Boswell at said El Dorado.

That thereafter and on the 7th day of November, A. D. 1872, at the office of said last-named company, at said El Dorado, its regular annual meeting provided for by its by-laws, of which said Boswell was presi-
13 dent pro tem., was held, at and by which B. F. Maguire, J. Biddison, B. F. Layton, and J. H. Johnson were each voted for viva voce for directors of said last-named company for the then ensuing year, and that each of them received all the votes cast at such meeting or for any officers, and was unanimously elected and declared by such meeting duly elected director of and for said company for the then ensuing year. That thereupon and then said Boswell, as such president pro tem., signed the certificate of the election of each of them as provided for by the by-laws of said last-named company, and that each of them so elected were then sworn to faithfully perform his duty required by law; that no other business was done at that meeting; that at such meeting and on the election of each of the persons so elected thereat and thereby, said defendant, by and through said Boswell, his attorney in fact and proxy therefor, voted representing said two hundred shares.

That thereafter, and on the 21st day of said November, another meeting of said last-named company was held at its office at said El Dorado, at and by which said Boswell was duly elected president and treasurer of said company for the then ensuing year, and said Layton was elected or chosen secretary thereof for the then ensuing year, or until the election and qualification of his successor in office. That at such meeting, and on
14 the election of each of the persons so elected thereat and thereby, said defendant, by and through said Boswell, his attorney in fact and proxy therefor, voted for each of the persons so elected, representing said two hundred shares; that at and by such meeting, E. A. Lathrop was chosen and employed as agent for such company, "to take charge of the office, books, &c., and have the management of the business of the company in the same manner and terms as heretofore, as per authority of the superintendent, further direction of this board," as stated among other things in the record of such meeting. That at such meeting no other business was done than as hereinbefore stated as having been.

That soon after the organization first aforesaid, the company so organized commenced, under and in pursuance of such organization and such

act, operating and cutting and constructing a ditch for the purpose aforesaid, and from time to time continued to until the organization of the company last aforesaid, which from such time to the completion of such ditch was engaged in cutting and constructing it, and in operating in the business for which it was formed as aforesaid.

That it was so completed at a length of ninety-seven miles on or about the spring of A. D. 1872, by an expenditure of about four hundred
15 and seventy-five thousand dollars. That it has since been increased in length by said last-named company to one hundred and twenty miles, at a considerable additional cost.

That on the 4th day of June, A. D. 1873, said last-named company being indebted to said James Patterson for groceries, dry goods, hardware, crockery, hats and caps, shoes and boots, clothing, provisions, and other articles of merchandise and personal property and money furnished it at its request at various times between the 10th day of March, A. D. 1871, and the 10th day of April, A. D. 1873, and for interest on such indebtedness in the sum of fifty thousand three hundred and ninety-four dollars and thirty-six cents, did, on the day and year last aforesaid, at El Dorado, Oregon, to wit, at the district aforesaid through and by William S. Boswell, in the name of Wm. S. Boswell, its then president, Benjamin F. Layton, in the name of Frank Layton, its then secretary, and James H. Johnson, in the name of J. H. Johnson, its then superintendent, made in writing its promissory note to said James Patterson and delivered it to him, and thereby promised to pay to him or order the sum of fifty thousand three hundred and ninety-four dollars and thirty-six cents, payable one day after date, without grace, only in gold coin of the Government of the United
16 States, for value received, with interest thereon in like gold coin, at the rate of one per cent. per month until paid. In which it is stipulated that if suit is instituted for the collection of any part of it that said defendant will pay one per cent. in gold coin additional as counsel fees; that neither said promissory note nor any part thereof has ever been paid.

That on the sixth day of said June, and after the maturity thereof, said promissory note was duly presented to the treasurer of said last-named company for payment, and payment thereof was then demanded of said treasurer, who refused to pay it.

That the indebtedness for which said promissory note was given accrued while said defendant was a stockholder in said last-named company, and that he has been such stockholder ever since and before said 10th day of March.

That on the 6th day of June, A. D. 1873, said Patterson, in and to the vacation of the circuit court of said county after the May term thereof, A. D. 1873, which was begun and held at the court-house in Baker City, in said county, on the 19th day of May, A. D. 1873, and from day to day continued until its termination, which was on the 28th day of May, A. D. 1873, before the honorable the judge thereof, commenced a suit against said last-named company by filing a complaint against it.

17 That in the summons issued in the suit last aforesaid it is, among other things, stated that such company was required to appear and answer said complaint within ten days from the date of the service of such summons on it if served within said county, or if served within any other

county in said State of Oregon within twenty days from the date of the service of such summons on it. And that if it did not so answer that said Patterson would take judgment against it for the sum of fifty thousand eight hundred and ninety-seven dollars and thirty-six cents, gold coin, and interest thereon from and after June 5th, A. D. 1873, in like gold coin, at the rate of one per cent. per month, and costs and disbursements.

That said summons was duly served in said county on the 7th day of said June. That said company did not within ten days from such service of said summons, nor ever, answer said complaint, nor within such time, nor at any time, obtain further time in which to answer it.

That said defendant having failed to answer within such time, and no further time having been given him therefor, said James Patterson, through and by his attorneys, Lawrence and Dugan, on the 2nd day of August, A. D. 1873, made an application in writing in said vacation to said
18 clerk of said circuit court, for a default against such company in such suit against it, and for judgment thereupon in his favor, and against such company, and filed such application with such clerk in the clerk's office of said circuit court, together with said promissory note. That thereupon, and afterwards, and on the day and year last aforesaid, a default was entered in said last-mentioned suit in vacation by such clerk of said circuit court in favor of said Patterson and against such company; and that afterwards, and upon such rendition of such default, and on the day and year last aforesaid, such clerk rendered judgment in such suit in favor of said Patterson, and against such company, which is as follows, to wit:

In the circuit court of the State of Oregon for Baker County, Oregon.

In vacation, after May term, A. D. 1873.

JAMES PATTERSON, PLAINTIFF,
vs.
THE MALHEUER AND BURNT RIVER CONSOLIDATED DITCH AND MINING COMPANY, defendants. } Action to recover money.

Now comes the plaintiff above named, by his attorneys, A. J. Lawrence and Frank P. Dugan, and files written motion for entry of judgment by default against said defendant, The Malheuer and Burnt River Con-
19 solidated Ditch and Mining Company, in above-entitled action, and it appearing that due service of summons was had on said defendant on the 7th day of June, A. D. 1873, in Baker County, Oregon, and said defendant came not, but made default by failing to answer the complaint in the time required by law and specified in the summons, and no further time having been granted by the court, the default against said defendant is hereby entered, and it is considered, ordered, and adjudged according to law, that plaintiff, James Patterson, have and recover judgment against said defendant, The Malheuer and Burnt River Consolidated Ditch and Mining Company, for the sum of fifty thousand eight hundred and ninety-seven and $\frac{36}{100}$ dollars, gold coin, and interest thereon at rate of one per cent. per month, and for costs and disbursements, and that execution issue therefor.

Entered August 2d, A. D. 1873.

LUTHER B. ISON,
Clerk of the Circuit Court of Baker County, Oregon.

Whereof said last named company was convicted, as by the record thereof in such court appears.

Said plaintiff avers that said defendant having so failed to answer, and no further time having been given him therefor, and said plaintiff having made such application, said clerk was authorized so to have entered such default and judgment by the first section of title numbered twelve,
20 of the act of said State of Oregon, entitled "An act of issues and the mode of trial," passed by the general assembly or legislature said of last-mentioned State, on the 20th day of December, A. D. 1865, when it became in force and yet so remains, and which is as follows:

"In an action arising upon contract for the recovery of money or damages, only if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof, the clerk, upon the application of the plaintiff made in writing and filed with the clerk, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs of the defendant or against one or more of several defendants, in cases provided for in section 59."

That afterwards, and on the 18th day of September, A. D. 1873, an assignment of said judgment was made on the records of said circuit court, of which the following is a copy:

STATE OF OREGON,
County of Baker, ss:

I, James Patterson, the plaintiff named in the within judgment of James Patterson vs. The Malheuer and Burnt River Consolidated Ditch and Mining Company, do hereby certify that for value received I have
21 this day assigned and do by these presents assign the same and the whole thereof to T. J. Brower, this September 18th, 1873.

JAMES PATTERSON.

Witness: LUTHER B. ISON, *Clerk.*

That afterwards, and on the 19th day of September, A. D. 1873, an execution of that date was sued out of the clerk's office of said circuit court, upon said judgment, directed to the sheriff of said county, whereby said sheriff was commanded of the personal property of such company, or, if sufficient thereof could not be found of the real estate belonging to such company in his said county, on or after the 2nd day of August, A. D. 1873, to make and satisfy said execution, and to return it into said circuit court in sixty days after receiving it. And it was then delivered to James H. Shinn, then sheriff of said county, to be executed, which execution said Shinn afterwards, and on the 29th day of September, A. D. 1873, returned into the clerk's office of said circuit court, with an endorsement of his return thereof, as such sheriff, upon the back thereof, which is as follows:

STATE OF OREGON,
County of Baker, ss:

I hereby certify that I am unable to find property whereby to make the money on the within security.

JAMES H. SHINN,
Sheriff.

Sh'ff's fees, 12.60.

22 As by such execution and return remaining in the clerk's office of said circuit court appears.

That thereafter, and on the 9th day of August, A. D. 1875, an execution of that date was sued out of the clerk's office of said circuit court, upon said judgment, directed to the sheriff of said county, whereby said sheriff was commanded of the personal property of such company, or, if sufficient thereof could not be found of the real estate belonging to such company in his said county on or after the 2nd day of August, A. D. 1873, to make and satisfy such execution, and to return it into said circuit court in sixty days after receiving it. And it was then delivered to J. M. Boyd, then sheriff of said county, to be executed, which said execution said Boyd, afterwards, and on the 10th day of August, A. D. 1875, by and through D. L. Moorman, then his deputy in such office, returned into the clerk's office of said circuit court, with an endorsement of his return thereof, as such sheriff, which is as follows:

STATE OF OREGON,
County of Baker, ss:

I hereby certify that I received the within execution on the 9th day of August, 1875, and herewith return the same unsatisfied. I have been unable to find any property in my county belonging to said defendants out of which to make the within execution.

J. M. BOYD, *Sheriff*,
By D. L. MOORMAN,
Deputy.

23 As by such execution and the return remaining in the clerk's office of said circuit court appears.

That said judgment still remains in full force and effect not in the least reversed, annulled, or set aside or satisfied, save as to one dollar applied on the costs made in such suit.

That said last mentioned company remains indebted to said Patterson, for the use of said Brower, as hereinbefore stated, in the sum of fifty thousand eight hundred and ninety-seven $\frac{36}{100}$ dollars in gold coin, with interest thereon, at the rate of twelve per cent. per annum in such coin from the 2nd day of August, A. D. 1873, and that said corporation is insolvent and has no property from which said Patterson can for the use of said Brower or otherwise make payment of such indebtedness or any part thereof.

That the constitution of the State of Oregon was adopted and became in force on the 18th day of September, A. D. 1857, and ever since has remained in force. That section numbered three, of the 11th article of such constitution, is as follows:

"The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

24 That section numbered 14 of the act of said State of Oregon, first aforesaid, is as follows:

"All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person for whom the same is

purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock, but if the sale be voluntary the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchasers."

Said plaintiff avers that by reason of the premises, and by virtue of each such section of said constitution and said section numbered fourteen, said defendant is individually liable to said Patterson, for the use of said Brower, for the indebtedness aforesaid of said last named company on said judgment to an extent not exceeding seventy thousand dollars, and interest thereupon, which is the amount unpaid of said two hundred shares of stock.

That by force of each thereof, and by means of what is otherwise herein stated, an action hath accrued to said Patterson to, for the use of said Brower, demand and have of and from said defendant the amount of said judgment, and the interest that has accrued thereupon in gold coin, to an amount not exceeding seventy thousand dollars, and interest thereupon; and being so liable the said defendant in consideration thereof, at the district aforesaid, undertook and promised to pay said Patterson, for the use of said Brower, such indebtedness, to an amount not exceeding seventy thousand dollars and interest thereupon when he should be thereafter requested so to do. Yet said defendant, not regarding said promises, has not paid such indebtedness nor any part thereof, although often requested so to do, to the damage of said plaintiff of seventy-six thousand dollars, and therefor they bring suit, &c.

C. M. HARRIS,
Their Attorney.

$50,394.36.] EL DORADO, OREGON, *June 4th*, 1873.

One day after date, without grace, we promise to pay James Patterson, or order, the sum of fifty thousand three hundred and ninety-four $\frac{36}{100}$ dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon, in like gold coin, at the rate of one per cent. per month until paid. It is further agreed that in case suit is instituted for the collection of any part of this note that we will pay one per cent. in gold coin additional as counsel fees.

(Signed) MALHEUER AND BURNT RIVER CONSOLIDATED DITCH AND MINING COMPANY,
By WM. S. BOSWELL, *President.*
FRANK LAYTON, *Secretary.*
J. H. JOHNSON, *Superintendent.*

The foregoing on this page is a copy of the promissory note described in the declaration to which it is attached.

C. M. HARRIS,
Att'y for Pl'ff in such Declaration.

In the circuit court of the State of Oregon for Baker County, Oregon.
In vacation after May term, 1873.

JAMES PATTERSON, PLAINTIFF,
vs.
THE MALHEUER AND BURNT RIVER CONSOLIDATED DITCH AND MINING COMPANY, DEFENDANTS. } Action to recover money.

Now comes the plaintiff above named, by his attorneys, A. J. Lawrence

and Frank P. Dugan, and files written motion for entry of judgment by default against said defendant, The Malheuer and Burnt River Consolidated Ditch and Mining Company, in above-entitled action, and it appearing that due service of summons was had on said defendant on the 7th day of June, A. D. 1873, in Baker County, Oregon, and said defendant came not, but made default by failing to answer the complaint in the
27 time required by law and specified in the summons, and no further time having been granted by the court, the default against said defendant is hereby entered, and it is considered, ordered, and adjudged, according to law, that plaintiff, James Patterson, have and recover judgment against said defendant, The Malheuer and Burnt River Consolidated Ditch and Mining Company, for the sum of fifty thousand eight hundred and ninety-seven and $\frac{36}{100}$ dollars, gold coin, and interest thereon from and after June 5th, 1873, in like gold coin, at rate of one per cent. per month, and for costs and disbursements, and that execution issue therefor.

Entered August 2d, A. D. 1873.

LUTHER B. ISON,
Clerk of the Circuit Court of Baker County, Oregon.

The foregoing purporting to be a copy of a judgment, is a copy of the one described in the execution which is attached.

C. M. HARRIS,
Att'y for Pl'ffs in such Declaration.

(Endorsed:) Filed Sept. 24, '75. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 4th day of October, A. D. 1875, said
28 defendant, by his attorneys, filed in said clerk's office his demurrer to the declaration of said plaintiff in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer to declaration.

Circuit court of the United States for the northern district of the State of Illinois, to the October term thereof, A. D. 1875.

JAMES PATTERSON, FOR THE USE OF THOMAS J. Brower, plaintiff,
vs.
CORNELIUS LYNDE, DEFENDANT.
} Assumpsit.

And the said defendant, by Osborn and Curtis, his attorneys, comes and defends the wrong and injury, when, &c., and says that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the defendant, and that he said defendant is not bound by law to answer the same.

And this he is ready to verify; wherefore by reason of the insufficiency of the said declaration in this behalf, the defendant prays judgment, and that the said plaintiff may be barred from maintaining his aforesaid action thereof against him, &c.

OSBORN AND CURTIS,
Att'ys for Def't.

Address: Rock Island, Illinois.

29 (Endorsed:) Filed Oct. 4, 1875. Wm. H. Bradley, cl'k

Afterwards, to wit, on the 17th day of December, A. D. 1875, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JAMES PATTERSON, USE, &C.,
v.
CORNELIUS LYNDE ET AL.

This cause having this day been called for trial, and the plaintiff and his attorney failing to appear, on motion of the defendants, by their attorneys, it is ordered that the same be continued.

Afterwards, to wit, on the 11th day of January, A. D. 1876, in the December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, district judge, is the following entry, to wit:

JAMES PATTERSON, USE OF, &C.,
vs.
CORNELIUS LYNDE, JR. } Assumpsit.

Now, come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration herein, and after
30 hearing the arguments of counsel, the court takes the same under advisement.

Afterwards, to wit, on the 29th day of February, A. D. 1876, in the said December term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, district judge, is the following entry, to wit:

JAMES PATTERSON, USE OF, &C.,
vs.
CORNELIUS LYNDE, JR. } Assumpsit.

Now come the parties, by their attorneys, and the court, having considered and being now fully advised upon the demurrer of the defendant to the declaration filed herein, sustains said demurrer, the court being of opinion that the plaintiff's remedy, if any, is in equity and not at law.

Afterwards, to wit, on the 12th day of October, A. D. 1878, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWER,
v.
CORNELIUS LYNDE, JR. } Assumpsit.

31 The demurrer of the defendant to the declaration herein having

been sustained by the court, and the plaintiff electing to abide by his said declaration, the court enters judgment thereon, and orders that this cause be dismissed at the costs of the plaintiff. It is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff his costs and charges about his defence in this behalf expended, amounting to the sum of thirteen dollars and sixty cents, and that he have execution therefor.

And afterwards, to wit, on the 22d day of September, A. D. 1879, said plaintiff, by his attorney, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWER, *v.* CORNELIUS LYNDE, JUNIOR.	In assumpsit. Damages, $76,000.

Know all men by these presents that we, James Patterson, of El Dorado, in the State of Oregon, Thomas J. Brower, of Sierra, in the State of California aforesaid, and D. Hobart Hills, of the county of Cook and State of Illinois, are held and firmly bound unto said Cornelius Lynde, junior,
of the city of Rock Island, in the State of Illinois, in the sum of
32 three hundred dollars, to be paid to him, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this 22nd day of September, A. D. 1879.

Whereas said James Patterson, for the use of said Thomas J. Brower, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action, on the twelfth day of October, A. D. 1878, by the circuit court of the United States for the northern district of the State of Illinois, at the October term thereof, A. D. 1878, for costs of said suit in favor of said Lynde, junior, and against said Patterson and Brower:

Now, therefore, the condition of this obligation is such that if said James Patterson and Thomas J. Brower shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

JAMES PATTERSON. [SEAL.]
THOMAS J. BROWER, [SEAL.]
By CHARLES M. HARRIS, [SEAL.]
His Attorney in Fact.
D. HOBART HILLS. [SEAL.]

33 Approved. Not to be a supersedeas.
H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Sept. 22, 1879. Wm. H. Bradley, cl'k.

Know all men by these presents that I, Thomas J. Brower, of the county of Washoe, in the State of Nevada, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Charles M. Harris, of the city of Chicago and State of Illinois, my true and lawful attorney, for me and in my name, place, and stead, to for me execute, make, and deliver any appeal bond or other bond that he may deem necessary for the prosecution of any writ of error in a suit commenced by James Patterson, for my use, in the circuit court of the United States for the northern district of Illinois, against Cornelius Lynde, jr., giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

34 In witness whereof I have hereunto set my hand and seal the first day of July, one thousand eight hundred and seventy-nine.

T. J. BROWER. [SEAL.]

Signed, sealed, and delivered in presence of—
JNO. S. GILSON.

STATE OF NEVADA,
County of Washoe, ss:

On this first day of July, A. D. one thousand eight hundred and seventy-nine, before me, Jno. S. Gilson, a notary public in and for said county of Washoe, duly commissioned and sworn, personally appeared T. J. Brower, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and he duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in the State of Nevada, County of Washoe, the day and year in this certificate first above written.

[SEAL.] JNO. S. GILSON,
Notary Public.

(Endorsed:) Filed Sept. 22, 1879. Wm. H. Bradley, cl'k.

35 NORTHERN DISTRICT OF ILLINOIS, *set:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a correct and complete transcript of the record of all the proceedings had in said court in the cause wherein James Patterson, for the use of Thomas J. Brower, is the plaintiff, and Cornelius Lnyde, jr., is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22d day of September, A. D. 1879, and of our Independence the 104th.

[SEAL.] WM. H. BRADLEY, *Clerk.*

36 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between James Patterson, for the use of Thomas J. Brower, plaintiff, and Cornelius Lynde, jr., defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said James Patterson, for the use of Thomas J. Brower, as by his complaint appears; and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1879, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. James Patterson, for use of, &c., vs. Cornelius Lynde, jr. Writ of error.

37 Supreme Court of the United States, October term thereof, A. D. 1879.

JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWER, *vs.* CORNELIUS LYNDE, JUNIOR.	In assumpsit. Damages, $76,000.

Before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes said plaintiffs, by their attorney, Samuel W. Packard, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, in the sustaining of the demurrer to the declaration of said plaintiffs herein, and in dismissing said suit. And said plaintiffs pray that the judgment aforesaid herein rendered may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of said payment.

SAMUEL W. PACKARD.

(Indorsed:) Sup. Court U. S. 1879, Octo. term. No. 1018. Patterson, for use, &c., vs. Lynde, junior. Assignment of error. Filed 23 October, 1879.

38 Supreme Court of the United States, October term thereof, A. D. 1879.

JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWER, *vs.* CORNELIUS LYNDE, JUNIOR.	In assumpsit. Damages, $76,000.

Before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come said plaintiffs in error per se, and say that in the records and proceedings aforesaid there is manifest error in this, to wit, that the court sustained the demurrer filed by said defendant, who was defendant in the court below, to the declaration of said plaintiffs in error herein who were plaintiffs herein in the *the* court below, and pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by reason of said judgment.

JAMES PATTERSON *per se.*
THOMAS J. BROWER *per se.*

39 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Cornelius Lynde, junior, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein James Patterson, for the use of Thomas J. Brower, are plaintiffs, and you are defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge of said court, this eleventh day of Oct., in the year of our Lord one thousand eight hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

Due service of above admitted this 15th day of October, A. D. 1879. Chicago, Ills.

LAWRENCE, CAMPBELL & LAWRENCE,
Att'ys for Defendant.

(Indorsed:) Supreme Court of the United States. vs.
. Citation. To October term, A. D. 18 .

40 The United States of America to Cornelius Lynde, jr., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in April next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of

Illinois, wherein James Patterson, for the use of Thomas J. Brower, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

This citation is issued and made returnable as above, in pursuance of the order of the said Supreme Court made March 14, 1881, in said case (which is numbered 664 on the present docket of the court) upon the decision of your motion to have the writ of error dismissed for want of proper
41 service of the citation first issued.

Witness the honorable Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, and ex officio judge of said circuit court, this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-one.

H. W. BLODGETT, *Judge.*

We hereby acknowledge service of a copy of the for'going citation this twenty-ninth day of March, A. D. 1881.

OSBORN & CURTIS,
Attorn'y' for Defendant.

(Indorsed:) Supreme Court U. S. 1880, October term. No. 664. Jas. Patterson, for the use of Thos. J. Brower, pl'ff in error, vs. Cornelius Lynde, jr. Citation & service. Filed 1st April, 1881. Office Supreme Court U. S. Filed Apr. 1, 1881. James H. McKenney, clerk.

(Indorsement on cover:) No. 122. James Patterson, for the use of Thomas J. Brower, plaintiff in error, vs. Cornelius Lynde, jr. N. Illinois C. C. U. S. Filed 23rd October, 1879.

16579

OFFICE SUPREME COURT U.S.
FILED
NOV 4 1882
JOSEPH H. McKENNEY, CLERK

IN THE

Supreme Court of the United States,

NO. 122.

OCTOBER TERM, A. D. 1882.

JAMES PATTERSON, for the case of THOMAS J. BROWER,
Plaintiffs in Error,
v.
CORNELIUS LYNDE, Jr.
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief for Plaintiff in Error.

F. W. PACKARD,
Attorney for Plaintiffs in Error.

CHICAGO.
Denvir & Lamphier, Legal Printers, 100 & 102 Madison Street.
1882.

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Supreme Court of the United States,

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OCTOBER TERM, A. D. 1882.

JAMES PATTERSON, for the case of
THOMAS J. BROWER,
Plaintiffs in Error,
v.
CORNELIUS LYNDE, Jr.
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief for Plaintiff in Error.

F. W. PACKARD,
Attorney for Plaintiffs in Error.

CHICAGO.
Denvir & Lanphier, Legal Printers, 100 & 102 Madison Street.
1882.

STATEMENT.

The suit was brought in assumpsit by Patterson, one of the plaintiffs in error, against Lynde defendant in error as a stockholder in "The Malheur and Burnt River Consolidated Ditch and Mining Company," on an indebtedness of that Company to him which accrued between the 10th March, 1871, and the 10th April, 1873, during which time Lynde was such stockholder, for which indebtedness the company on the latter day executed to Patterson its promissary note for $50,394,36, payable one day after date, in gold coin with interest in like coin at one per cent per month thereon without grace, in which it is stipulated that if suit is instituted for any part of it, such corporation would pay one per cent additional in gold coin as counsel fees, (Abst. 7) and that no part thereof of said note was ever paid; and that on the 6th June thereafter such note was duly presented to the treasurer of such company for payment, when payment thereof was then demanded of him who did not pay it.

That on the 2nd August, 1873, Patterson obtained against such company judgment on the note for $50,897.36 (Abst. 8), that such judgment was taken under an act of the General Assembly of the State of Oregon entitled "An act of issues and the mode of trial" approved 20th December, 1865, page 156 of Revised Statutes, which is as follows;

"In an action arising upon a contract for the recovery of money or damages only if no answer has been filed, with the clerk of the court within the time specified in the summons or such further time as may have been granted by the court or judge thereof, the clerk upon the application of the plaintiff made in writing, and filed with the clerk, shall enter the default of the defendant, or against one or more of several defendants in cases provided for in section 59" (Abst. 9.)

The court will perceive from pages seven and eight of abstaact that such judgment was taken in conformity with such statute.

That such judgment bears interest at the rate of 12 per cent in such coin, and now amounts to $107,597 that on the 18th September, 1873, the judgment was assigned by Patterson to Brower, one of the plaintiffs in error, (Abst. 9) that on the 19th September, 1873, an execution was issued on such judgment, and on the 29th of that month returned no property found, and that on the 10th August thereafter an alias execution was issued on such judgment and on the day thereafter returned no property found; (Abst. 9 & 10) that such judgment still remains in full force and effect, and not in the least reversed, annulled or satisfied save as to one dollar applied on costs. That such company was at Auburn, Baker County, Oregon, on the 6th Nov., 1873, originally organized in the name of the Burnt River Ditch and Mining Company, with a capital stock of $24,000, divided into shares of $100 each, for the purpose of constructing ditches, mining and selling water to miners and others in Baker County, and more particularly in the min-

ing camps in the vicinity of Burnt River and Willow Creek in that County, under sections one, two, three, four, five and six of an act of the General Assembly of that state, approved on the 14th October, 1864, which are as follows; (Abst. 3.)

SEC. 1. Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this chapter.

SEC. 2. Such persons shall make and subscribe written articles of incorporation in triplicate and acknowledge the same before any officer authorized to take the acknowledgement of a deed, and file one of such articles in the office of the secretary of state, another with the clerk of the county where the enterprise, business, pursuit or occupation is proposed to be carried on, or the principle office or place of business is proposed to be located, and retain the third in the possession of the corporation.

SEC. 3. The articles of incorporation or a certified copy of the one filed with the secretary of state or the county clerk, is evidence of the existence of such corporation.

SEC. 4. The articles of incorporation shall specify,

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited.

2. The enterprise, business, pursuit or occupation in which the corporation proposes to engage.

3. The place where the corporation proposes to have its principal office or place of business.

4. The amount of the capital stock of the corporation.

5. The amount of each share of such capital stock.

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railway, macadamized road, plank road, dry road, canal or bridge, the termini of such navigation, road, canal, or the site of such bridge.

SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same as corporators, and authorized to carry into effect the object specified in the articles, in the manner provided in this chapter, and they and their successors, associates, and assigns by the name assumed in such articles shall hereafter be deemed a body corporate with power,

1. To sue and be sued.

2. To contract and be contracted with.

3. To have and use a corporate seal, and the same to alter at pleasure.

4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation.

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation.

6. To make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution. Provided, that no such sale shall be made without thirty days' notice of time and place of sale in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs.

(Abs, 3 and 5, and pages 524–526 Revised Statutes of Oregon.)

That, under section nineteen of such act, and on the third day of August A. D. 1864, the capital stock of such company, at a meeting of the stockholders thereof called for such purpose, was increased to $144,000, divided into one thousand four hundred and forty four shares, which section is as follows;

"Any company organized under the provisions of this chapter, may at any meeting of the stockholders which is called for such purpose by a vote of the majority of the stock of such corporation, increase or diminish its capital stock, or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and the disposal of its property, and dividing its capitol stock in any manner it may seen proper." (Abst. 4.)

That, under sections nineteen, twenty-one and twenty two of said act, a copy of the former of which has been given, and the others of which are as follows:

SEC. 21. "The stockholders may by a majority vote of the stock, change its general place of business. . .

SEC. 22. "The directors of any corporation may file supplementary articles of incorporation at any time when a unanimous vote of all the stock subscribed shall so determine, for the purpose of engaging in any new enterprise or business pursuit, not in violation of law, or for the purpose of changing any part of their road or canal, or either termini, or both, the directors shall cause a notice to be served, of the filing of such supplementary articles, setting forth the object of the same" (Abst. 5)

That the then stockholders of such company did on the 19, September, 1870, file supplementary articles of such corporation, on the 19th day of September, A. D. 1870, at Eldorado, in said county, and supplemental articles of such incorporation for the purpose of changing the name of such corporation from that of The Burnt River Ditch and Mining Company to that of The Malheuer Burnt River Consolidated Ditch and Mining Company, of extending the business of said corporation to the constructing of ditches, merchandising, and lumbering in said county, of removing its principal business office from said Clark's Creek to El Dorado, in said county, and of increasing the capital stock of said corporation to one million dollars, divided into two thousand shares, of the nominal value of five hundred dollars each.

That on the 7th day of March, A. D. 1871, defendant subscribed to and for, and took of such capital stock of said last named company, two hundred shares, of

the nominal value of five hundred dollars each, and thereby became a member in and stockholder of said last mentioned company, and that said last named company, thereupon entered the name of defendant in its stock or subscription book, as a member thereof and stockholder therein, to the amount of two hundred shares, and did then make and deliver to said defendant its certificate in writing, numbered two, stating that he, said defendant, was entitled to two hundred shares of the capital stock of the company, of the nominal value of five hundred dollars each, and that defendant then received and accepted certificate. (Abst. 5.)

That by reason of Section 3 of the Eleventh Article of the Constitution of the State of Oregon, which was adopted on the 18th of September, 1857, which is as follows:

"The stockholders of all corporations and joint stock companies, shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." (Abst. 10.)—Of defendant, having become a stockholder of the company, and of its indebtedness stated, became bound to pay the amount thereof with interest.

That from the day and year last aforesaid, until after the execution of the promissory note hereinafter described, defendant caused it to be generally known in the section of the country in which said ditch is located, and other places, that he was a stockholder in said last named company, and thereby enabled it to obtain credit that it other-

wise could not have, and did repeatedly state to creditors of the company that all its debts should be paid so soon as the water was let into ditch, stating that it would be soon, and request them to so say to others, such creditors for him. All which was known to Patterson before the execution of said promissory note, and was an inducement to him to give the credit which he did to the company.

That previous to the execution of such promissory note, Lynde had paid on the shares so held by him, as aforesaid, thirty thousand dollars; that he has never paid any more thereupon, and now is indebted to the company seventy thousand dollars, with interest thereupon. (Abs. 5.)

That on the 10 day of October, A. D. 1872, defendant did, with R. R. Cable, C. R, Chamberlain, Louis M. Buford, Edward George and B. D. Buford, in writing, under the seal of each, acknowledged before a notary public by each of them, authorize W. S. Boswell to, as their attorney, cast all the votes to which they were entitled in any and all meetings of the stockholders of such company, and send it to said Boswell at El Dorado.

That on the 7th day of November, A. D. 1872, at the office of such company, at El Dorado, its regular annual meeting, provided for by its by-laws, of which Boswell was president pro tem., was held, at and by which B. F. Maguire, J. Biddison, B. F. Layton and J. H. Johnson were each voted for, *vive voce*, for directors of such company for the then ensuing year, and that each of them received all the votes cast at such meeting or for any officers, and was unanimously elected, and declared by such meeting duly

elected director of, and for the company for the then ensuing year. That thereupon Boswell, as such president pro tem., signed the certificate of election of each of them, as provided for by the by-laws of the company, and that each of them so elected were then sworn to faithfully perform his duty required by law; that no other business was done at that meeting; that at such meeting, and on the election of each of the persons so elected thereat and thereby, defendant, by and through Boswell, his attorney in fact and proxy therefor, voted, representing such two hundred shares.

That on the 21st day of said November, another meeting of the company was held at its office at El Dorado, at and by which Boswell was duly elected president and treasurer of the company for the then ensuing year, and Layton was elected, or chosen, secretary thereof for the then ensuing year, or until the election and qualification of his successor in office. That at such meeting, and on the election of each of the persons so elected thereat and thereby, defendant, by and through Boswell, his attorney in fact and proxy therefor, voted for each of the persons so elected, representing such two hundred shares; that at and by such meeting, E. A. Lathrop was chosen and employed as agent of such company, "to take charge of the office, books, &c., and have the management of the business of the company in the same manner and on like terms as theretofore, as per authority of the superintendent, and on further direction of the board," as stated among other things in the record of such meeting. That at such meeting no other business was done than as hereinbefore stated as having been. (Abs. 6.)

That soon after the organization first aforesaid, the company so organized commenced, under and in pursuance of such organization and such act, cutting, constructing and operating the ditch for the purpose stated, and continued to until the reorganization last stated and thereafter, and had on or about the spring of 1872, completed about ninety-seven miles of the ditch, at an expenditure of about $475,000, and has since increased its length to one hundred and twenty miles, at considerable additional cost. (Abst. 7.)

The trial below was on a general demurrer to the declaration which was sustained, and thereupon the suit was dismissed at the costs of plaintiffs in error, and judgment rendered against them for costs, and thereupon a writ of error was applied for and obtained by them who assigns, on nhe ground that plaintiffs remedy if any is in equity not at law, for error.

For error it is assigned,

That it appears from the record and proceedings that manifest error was committed in this, that the court below sustained the demurrer and dismissed the suit. (Abst. 15.)

The declaration embraces pages three to twelve of abstract.

As no question was raised by argument, or the citation of authorities in the court below, save that the remedy, if any, was in chancery, the presentation of authorities upon any other seems superfluous, especially as

the averments in the declaration, on demurrer thereto show the existence of the corporation, the subscription of defendant thereto for stock, and its indebtedness to plaintiff and defendant's liability therefor with interest thereon, and though unnecessarily the infra vires of all thereof.

I

ESTOPPEL.

Independent of Conduct &c.

Conceding that the incorporation of the company and all its proceedings are irregular, including change of name, extension of business, increase of capital, &c., neither of which do I, defendant is estopped from alledging such irregularity, independent of the fact of his having become a stockholder after such increase of stock, &c., his declaration of assurance to creditors, his payment of $30,000 of his subscription, his participation in the government of the company as a stockholder, his declarations that he was one, and assurance to creditors of the corporation including Patterson, that they would be paid, and his conduct doubtless to have given credit to the corporation, which of itself would so esstop him, and does, as I expect to show from denying his liability. Yet, regardless of which, it is immaterial whether the corporation is one de jure or de facto.

In connection with all which, its "user" should, if deemed necessary, be considered.

"A party who made a contract with an organization which had attempted to create itself into a corporation, and which acted as such, or who subscribed to its capital stock, cannot, in a suit by the corporation, defeud himself against a claim growing out of such contract or subscription by alleging the irregularity of such organization. The same rule applies where the stock of such corporation has been increased, and the question arises upon the liability of a subscriber for the increased stock." 95 U. S. 665, Chubb v. Upton.

"Assumpsit by an assignee in bankruptcy of an insurance company against the holders of its shares of stock, to enforce the collection of the balance due thereon, the same not having been paid parsuant to the order of court sitting in bankruptcy. Plea, non-assumpsit." *Held* 1st, that the plea admits the existence of the corporation, and that the State alone can raise the question whether the corporate stock has been properly increased."

2. "That the transferee of the stock who caused the transfer to be made to himself on the books of the corporation, although he holds it as collateral security for a debt of his transferer, is liable for such balance to such assignee." 6 Otto 328, Pullman v. Upton."

As estoppel against a stockholder in many cases applies in favor of a creditor when it does not of the corporation itself, and never does *e converso*, each of the cases cited applies with the more force in favor of this.

In 19 Wall 678, the court says that in Sedgwick on statutory and constitutional law it is stated that :

"It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreements with its charter, where it is a simple question of capacity or authority to contract arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains."

Says Justice Miller, in Thomas v. R. R. Co., 101, U. S., in which it was contended that the contract had been executed, but was held to have been not only unexecuted, but against public policy :

"In regard to corporations, the rule has been well laid down by Comstock, C. J. in Parish v. Wheeler, 22 N. Y., 494, that the executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith require it."

The case so referred to, holds, among other things.

"That though a corporation exceed its legal powers in the purchase of such boats, it can not, nor can any one claiming under it, set up such violation of duty, to defeat the title of the mortgagee. Nor can the corpora-

tion defend itself against a claim for money paid at its request, to one who advanced the price paid for it, on the ground that the purchase was *ultra vires, although* the plaintiff, *when he paid the money, knew all the facts.*"

"If the people intended to rely on their defences to the old bonds, then was the time for them to speak, and, by their vote, say, that they would not recognize them as binding obligations. By voting the other way, they, in effect, accepted them, as legal and subsisting, for the purposes of the proposed extension of time, at reduced interest, and said to the stockholders, if their proposition was accepted, *no question of illegality* would be raised. 2 Transt. of U. S., S. C., Decissions, Jasper County v. Ballou.

That case refers to 34 Ills., 421, in the opinion in which Breese, J. says:

"Whether the bonds were issued under the 2nd or 17th section of the act of 1857, we think the corporation is estopped from setting up any irregularity in their issue, in as much as they have repeatedly recognized their validity, by paying them out, levying the taxes, and paying the interest on them, for a series of years. Which is also a municipal incorporation.

I refer also to 91 U. S., 65, Webster v. Upton, and Assignee &c., 94 U. S., 680, Casi v. Galli; 2 Trans. S. C., U. S., Decis. 745; 94 Penn., state, 429, Spahr v. Farmers' Bank of &c.

Defendant in error, is charged, as a member of a private corporation, on which account the rules of estoppel applies, under many circumstances. against him, when they would not against a *municipal* corporation and those of ultra vires, do not in his favor, when they would in favor of such corporations, which I mention because such case of this court, and the one referred to by it, are against *municipal* corporations, and to avoid a a repetition relative to others referred to, and to be referred to, relative to such corporations, all of which, on such account, are the stronger against a stockholder, than if made against a corporation.

"It is urged by appellant that as the amendatory act conferred banking powers and was not voted upon by the people as well as for other reasons suggested was unconstitutional and void. We do not deem it necessary to pass upon the question, for were it so, the case would be within McCarthy v. Lansher 78 Ill., 271, which holds that though a charter is unconstitutional yet if the stock holder has acted under it and thereby induced or contributed to the loss of a creditor of the corporation, the stock-holder is estopped from denying his liability. It was shown by the admission of appellant that he was a stock-holder. We know of no rule requiring such a creditor to prove by record evidence that one was a stock-holder, in order to impose upon him a personal liability. If money was in fact deposited in the bank, and no certificate of deposit was required or given, it would nevertheless be a deposit in trust, and entitled to all the safeguards and protection provided to impose such payment liability."

Ill. Dows v. Naper.

91 Ills. 44, is to like effect.

21 Ills. 93, Price v. R. I. R. R. Co.

24 Id. 46, Tarbell v. Page et al.

89 Id. 270, McCarthy v. Lavasche.

21 Id. 25, I. C. R. R. Co. v. Cox.

41 Id. 85, Stone v. Great Western Oil Co.

19 N. Y. 119, Eaton et al v. Aspinall.

15 Gray 594, Dooley v. Cheshire Glass Co.

7 Gratt 252, Cramp et al v. U. S.

16 B. Monroe 7.

Boone's Manual of Corporations, Sec. 121, Herman on Estoppel, 569.

"Parties are estopped from denying the constitutionality of a local statute by participating in the procurement of its passage ; by ratifying, acquiescing in, or approving it after its passage, and by becoming recepients of benefits under it; and all such persons are held to be liable to the tax authorized by such enactment, although it is unconstitutional and invalid as to all other persons."

4 Kent (Comstock's ed. note 4,) S. P. 261 ; 3 Hill 219 ; 5 Bush 231 Ferguson &c., v. Landram &c.

"We hold it to be a sound rule of law, resting upon the clearest principle of justice, and supported by authority, that when an association holds itself out to the public

as operating in a particular line of business, under a name that argues or imports a corporation, and in that name contracts with individuals, then, as to all such persons with whom it contracts, it shall be estopped from denying its corporate existence. United States Express Co., v. Bedbury 34 Ills. 459 ; Callender v. Painesvilie, and Hudson R. R. Co., 11 Ohio state, 516 ; Dooley v. Cheshire Glass Co. 15 Gray 494 : Bigelow on Estoppel, 462."

6 Bradwell's reports, 286 Clarkson v. E. & N. S. Dispatch.

Where a charter has been granted to certain parties to act as a corporation, and they are actually in the possession and enjoyment of the corporate rights granted, such possession and enjoyment are valid against any one who deals with them in their corporate character, and he cannot be permitted, in a collateral proceeding, to prove that a condition precedent to its full corporate existence has not been complied with. 94 Penn. stat. 429. Spah v. Farmer's Bank, ."Held, 1st, that the bank was not prohibited by law from the payment of the note."

2. That it is to be presumed that C had rightfully the power he assumed to exercise, and the bank is estopped to deny it.

3. "That the bank by its retention and enjoyment of the proceeds of the note rendered the act of C as binding as if it had been authorized"

101 U. S. 181, Peoples Bank v. National Bank.

"If corporations to increase their profits embark in enterprises not authorized by their charter, still as to third persons and when necesssary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officeas when they transgress the limits of their chartered authority.

55 Ills., 413, Bradley v. Ballard.

"If a subscriber assent to material change in the corporate affairs even by implication, as by paying assessments with knowledge of the change, he cannot be relieved from payment of his subscription by reason of such change. So it is an established rule that in the absence of fraud a party recognizing the existence of a corporation by subscribing for its stock, cannot defend an action on his subscriptions by impeaching the existence of the capacity of the corporation. As long as defects in the corporation or subsequsnt abuse of the corporate powers are tolerated by the State, it is not for individual subscribers to call them in question. And a transferee of shares is estopped from disputing the validity of a subscription upon any grounds that could not have been taken by the original subscriber. The admission of a subscriber that he is a subscriber to the stock of a company, upon the faith of which others are induced to act for his benefit, will estop him from afterward denying that he did in fact subscribe."

Boone's Law of Corporations (Ed. 1882) Sec. 121, refers to, among many other authorities, Upton, assignee, v. Niblock, 91 U. S. 45; Sawyer v, Hoag, 17 Wall, 610; Oglevie v. Knox Ins. Co,, 22 How, 380.

"One who accepts and holds certificates for unpaid shares of stock, and votes them at annual elections, is estopped from denying his liability as a stockholder to the corporation or its creditors, although issued to him under an agreement in writing that they were to be held in trust or as a security only, and were not subscribed for on the books of the company, or otherwise in the usual manner of making subscriptions. One may be constituted a stockholder by his conduct as effectually as by the rigid observance of the usual formalities in making subscriptions.

Parties dealing with corporations are not affected with notice of entries made upon its corporate books, limiting the liability of holders of unpaid stock."

2 Central L. Jour., 432.

Myer v. Western Car Co., S. C. U. S.

East St. Louis v. East St. Louis, S. C. Ills.

"Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation and is sued upon the contract, neither is permitted to deny the *existence* or *legal* validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and good faith, and involves a mockery of justice."

94 U. S. 680, Casey v. Galli.

Refers to Eaton et al v. Aspinwall, 19 N, Y. 119, sc. 6 Duer 176, three others of that state, and three of the Supreme Court of Massachusetts to two of that of North Carolina, and to one of each of Connecticut, Kentucky, Alabama and Indiana.

136 L. N. 301, S. C. U. S. County of Morgan v. Allen et al.

91 U. S. 65, Webster v. Upton, Assignee.

102 U. S. 314, 314 Upton v. Hanley.

8 Reptr. 449, Germania Nat. Bank v. Case S. C. U. S. said to be reported in 98 U. S. but I have not ascertained that if has been reported.

47 Iowa, Iowa 588, Hervey v. Buchanan.

97 Penn. st, 534 Hagerman et al v. Empire &c.

II.

ESTOPPEL.

2. *By Conduct &c.*

Independent of authorities already cited, defendant is estopped from denying his liability, on account of his subscription, payment of $30,000 thereon—admissions that he was a stock-holder—participations in the government of the company ; his assurances to creditors that its debts would be paid, and his declarations and conduct, appearing in my statement of the case and the declaration herein, and would be, did the facts relied upon by defendant constitute ultra vives, which they do not, and if they did would by reason of such acts, declarations, assurances and conduct infra rises.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will in the absence of proof to the contrary, be presumed to to be valid. Corporations are presumed to contract within their powers. The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

96 U. S. 267, Rail W. Co., v. McCarthy.
91 Id. 45, Upton v. Niblock.
96 Id. 640, Gold v. Natl. Bank.
98 Id. 621, Union Natl. Bank v. Matthews.
2 Traust U. S. S. C., decis. 212, Tipton &c., v. Locomtive &c.

"One may render hlmself liable as stock-holder in a corporation as well by his conduct in respect to the stock of the corporation as by formal subscription and acceptance of stock."

73 Ills. 110, Griswold v. Seligman.

"The defendant is not in a position to dispute the validity of the incorporation. He had become a stockholder ; acted for several years as a trustee ; taken part in the management, and contracted with it as a corporation."

67 N. Y. 294-298, Phoenix &c., v. Badger.
77 Penn. St., 96, O'Harse v. Natl. Bank.
43 Wis., 420, Germantown v. Sherman.
Mahoning Mining Co., v. Bank, S. C. U. S. Oct. Term, 1818.

77. Corporations are liable for anything they commit, and in such cases the doctrine of ultra vires has no application. They are also liable for the acts of their servants while they are engaged in their business, just as individuals are under like circumstances.

100 U. S. 702, Nat'l Bank v. Graham.

I refer also to 22 How 391, Ogilvie v. Keep, &c.

"If a shareholder assumes the benefits and advantages of a partner, he cannot when called upon to respond for the contracts of the corporation deny his liability."

2 Bissell 146, Nat'l Park Bank v.

I refer also to 8 Rept'r 641, Deemphil v. Ohio & Miss. R. Co.

As the constitutional liability attaches as well to "joint stock companies" whice are a species of partnership, as to incorporated ones, it would under any circumstances be immaterial whether it was ever an incorporation de facto.

III
THE REMEDY.

Whether it is being porperly sought at law depends upon the nature of the subject matter of the suit, because unless it is too complicated for adjudication under the rules of law, the remedy is at law, and would be were the right sought a common law one, which it is not, but wholly statutory, and consequently a legal one, and cannot be enforced only at law unless the statute creating it provides some other, or from its nature and complications a full one can be had only in equity which, must appear from the bill, as otherwise it is presumed to be cognizable at law as equity takes exclusive cognizance only of that which the law, on account of the universality and rigidity of its rules, cannot. The right sought in this case ariscs from a subscription of defendant for two hundred shares to a corporation of the State of Oregon, organized under a public statute of that State, with a capital of a million dollars of shares of five hundred dollars each, the constitution of which provides that "The stockholders of all corporations and joint stock companies, shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more," — Abst. 10; and from an indebtedness which

while defendant was a stockholder in such company, accrued from it to Patterson, one of plaintiffs in error, for which its promissory note was exeuted to him, and upon which he obtained judgment against it, and thereupon had two executions issued, each of which were returned no property found, which judgment was assigned by Patterson to Thomas J. Brower, his co-plaintiff in error.

While such indebtedness of the company is unquestioned, it arose as well against defendant and his then co-stockholders, individually, aand of course primarily and unconditionally, and conferred on Patterson as direct, defined, absolute and simple a right, and necessarily remedy therefor, as any pecuiary obligation to any one could have. Yet it is insisted that the obligation is not only joint, but is to the company only, and that plaintiffs' only remedy is in chancery on behalf themselves and all other creditors against the corporation, and all of its stockholders for a settlement of all its affairs, although such is but a common law right, and cannot therefore be the only one if there is any virtue in such constitutional provision, the like of which are, I suppose, contained in constitutional or legislative provisions of most, if not all, civilized countries in which they are required to create a personal liability of stockholders to creditors, not for the protection of corporations, but for the benefit or their creditors, although they derive credit from them that they otherwise could not obtain.

Such a remedy only would be of no avail to creditors who ordinarily most need the statutory or an effi-

cacious one. as they are usually for small amounts, and such a remedy against the corporation involved in this case would cost ten thosand dollars, and as against many other corporations, would cost several times that amount, and consequently the want of any other would be a virtual indemnity to such corporations as would embrace it against paying debts of much larger amounts, as few if any would seek it without expectation of receiving much more than they would have to expend or even advance in an effort therefor, which might be unsuccessful.

As in no country has all courts, or many inferior ones, chancery jurisdiction, and as in many, if not most such courts, have a minimum jurisdiction, if the remedy is only in chancery creditors would be without remedy in such as have not such jurisdiction, as would those whose claims are within the minimum, though their claims were not only statutory but strictly legal, and such constitutional and legislative provisions were made to give them a remedy at law, because more direct, certain, speedy and efficacious.

Such a holding as is contended for, would so impair the credit of corporations and reduce the number and amount of creditors, as to more injuriously affect them, and by reason of impeding their operations, the country than creditors.

I do not intend to annoy the court by presentation of authorities specially to sustain each of the legal propositions stated under this devision, as all of them will be

by such of this court as well as of the highest courts of New York, Massachusetts, Pennsylvania, Ohio, Iowa, Vermont Connecticut, Virginia, Kentucky, Georgia, and of this and other States, which I expect to present.

While it is on demurrer immaterial as against plaintiffs, whether the liability is joint or several, as actions at law are joint or several, or both, as determined by the contract of obligation, and as no plea in abatement by which only advantage can be taken of, non-joinder has been filed. Yet as it is several, and as that fact, and the one that the liability is as well to each creditor of the corporation as to the corporation or company itself, is conclusive against defendant, I proceed first to show both, and in so doing will make but little reference to the latter, as most authorities upon the former apply to it.

The argument advanced to show that the obligation is joint, is that the language used in the constitutional provisions already quoted, is that the stockholders shall be liable, not that each of them shall be. upon the same principle a promissory of one person stating we instead ot "I" promise to pay, would be a joint note, which it could not be unless the use of the word "we" created a joint obltgation, and consequently a human being as no one person, can any more create a joint obligation than he can a fellow being, or contract with himself.

Each stockholder is entitledin severalty for the number of shares shares subscribed for by him, and is so liable only for the par values thereof.

"The creditor need not go on all the stockholders for their respective *pro rata* shares, but may recover his entire debt out of one, provided the debt does not exceed his proportion of the entire indebtedness of the company, the individual liability clause in the charter being as follows: "The stockholders in the company shall be liable *pro rata* for the debts of said company, to the amount of the stock they respectively hold."

56 Ga., 563, Wier et al. v. Hall et al.

Justice Wood, in Hatch v. Burroughs, 1 Wood's U. S. C. C. R., 442, says of the act of Georgia so referred to, or a similar one, that

"After a careful consideration of the charter of the bank, we are unable to reach the conclusion that the stockholders are mere sureties or guarantors; on the contrary, the language seems to import with great clearness and force a primary liability. The persons and property of the stockholders are at all times liable, pledged and bound for the redemption of the bills of the bank. The *stockholders* in person and property are liable at all times. At the very moment the bill is issued by the bank this liability arises, and there is no word or phrase to indicate that the liability is conditional or secondary, or that it can in any way be avoided save by the redemtion of the bills. In other words, it appears to us that under this charter the bank and stockholders, *jointly and severally*, undertake to pay the bills."

The court will perceive that while the clause imposing liability in the preceding case is like the one in this, in two respects: in using "the words stockholders,"

and in not stating that the *liability* is to the *creditors* but unlike it in imposing a *pro rata* liability instead of one for amount of stock unpaid, as does the one in this case, on which account the liability in this case is the more easily ascertainable, and that case is the stronger authority in this.

Paine v. Stewart, 33 Conn., 530; Approves Bank of Poughkeepsie v. Ibbotson, 24 Wend., 473 which holds that stockholders are severally and at law liable, stating that "it was so held, not on the ground that the word "individual" imparts a several liability, but upon that, that their interest and consequent liability being *unequal and limited*, a joint judgment cannot be rendered against *all*, and that there was force in such grounds," and approves them stating that in any view, the defendant not having plead in abatement, cannot succeed.

Bank of Poughkeepsie v. Ibbottson, supra, as well as other cases of the same court, are by this court in Pollard v. Bailey 20 Wall, 527, introduced below by defendants, approved by being distinguished from it.

I refer also to

101 U. S. 205, Hatch v. Doud.

22 How, U. S. 391, Olgilvie v. Knox Ins. Co.

If the liability of the stockholder is not to creditors as well as to the corporations, constatutional provisions and legislative enactments made for their benefit, and creating what is so universally called a statutory liability,

are without force, athough it was never pretended that such liability was to other than creditors, who, independent of such provisions or enactments, can, by garnishee or suit at law against the corporation and in equity against it and its stockholders, enforce their liability to the corporation for their use. to avoid the intricacy, uncertainty, delay and consuming expense of which such provisions and enactments were made.

As most of the cases referred to, to show the liability to be several do in principle, that is to creditors, I refer only to 1 Woods, U, S. C. C. R., 442. and 56 Go., 563, of them, made on a statute stating that the *stockholders* are liable, and omitting to state to whom the liability is created, and as most of the cases to which I expect to refer were made on statutes with a like omission, I need designate only so many as I can remember. which are:

Gulliver v. Roelle, 100 Ills., 141.

Avery v. Weir, 89 Id., 25.

Tibballs v. Libby, 88 Id., 142, and

Butler v. Walker, 80 Id., 345.

This case being without a feature of equitable jurisdiction, is cognizable only at law, and consequently not even concurrently in equity, yet were it as are many cases of its class, it would nevertheless be within the jurisdiction at law.

If this case is not cognizable at law, there can be no concurrent jurisdiction in any matter of indebtedness, in courts

of law and equity, as the right sought in it is not only created by the constitution wherefore the remedy in the absence of any enactment requiring it to be otherwise is at law, but because it was created as direct and simple an obligation as ever was, and independent, unconditional and without complication, the amount of which is easily and certainly ascertainable by the rule of addition, the most simple of all arithmitical ones, which even was not required in this case when this suit was commenced, as *it had been fixed by the execution of a promissary note, upon which judgment had been obtained, and on which two executions had been returned no property found, although plaintiffs' right at law does not depend upon such judgment, and consequently not upon even the issuing of an execution thereupon, as does most of what is termed "statutory liabilities of stockholders" though cognizable at law, wherefore this is as pronounced a case of exclusive jurisdiction at law as could be stated, and, to contend that it is not so cognizable, is to that no suit for the recovery of an indebtedness, is.*

"The absence of a plain and adequate remedy at law is the only test of equity jurisdiction, and it is manifest that a resort to a court of chancery was not necessary in order to enable the rail-road companies to recover their debt." 6 Wall 136. Thompson v. Rall Road Companies.

93 U. S., 378, Van Norden v Merton.

In 20 Wallace 577, the court says that in Ballard v. Bell, 1 Mason 243, Justice Story says that:

"'Whatever is enjoined by a statute to be done creates a duty on the party which he is bound to perform, where,

therefore, a statute declares that under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and these circumstances occur it creates a direct and immediate obligation to pay it."

101 U. S., 205, Hatch v. Doud, which approves 22 N. Y., 494.

20 Wall, 527, Pollard v. Bailey.

1 Woods, C. C. U. S. R., 442, Hatch v. Burroughs, by Woods, J.

33 Conn., 530, Paine v. Steuart.

56 Ga., 563, Weir, et al v. Hall, et al.

"The statute creating the Harlan Canal Company does not imply that the equities between the parties are to be considered, and the language is: And any person having any demand against said company may sue any stockholder singly or any two or more stockholders jointly, and recover in any court having cognizance thereof."

15 Wend., 549, Semmanson v. Spencer, et al.

That case is approved by 20 Wall, 527, Pollard v. Bailey, supra., by being distinguished from it.

"As regards creditors, there is no distinction between such a demand, unpaid stock, and any other assets of the corporation."

13 C. L. N. 301, S. C. U. S., city of Morgan v. Allen, et al.

"The stockholder is regarded as a principal debtor and not as surety for the defendant corporation, and, although the creditor holds property pledged to him by the corporation for payment of its indebtedness to him, undisposed of, he may proceed to enforce the individual liability of the stockholder."

Sonoma &c., v. Hill, S. C. Cal., Nov. 1881.

Says Justice Woods in Hall v. Yahoola &c., 1 Woods C., R. U. S. C. 547:

"The distinction between law and equity as recognized in the constitution, and the principles and precedence which at the period of the formation of the constitution so clearly distinguished *legal from equitable remedies*, have not, thus far in our judicial history, *been unsettled* by the blending of law and equity, in the courts of the United States; they are still administered as distinct systems of remedial Justice." Const. U. S., Art. III, Sec. II.

"In Bennett v. Butterworth, 11 How, U. S. 674, the Supreme Court declares that although the forms of proceedings and practice in the state courts shall have been accepted in the state courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in the same suit," and in Thompson v. Rail Road Companies, the same court says:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between

law and equity. The remedies in the courts of the United States are at common law or in equity not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." This case refers to Robinson v. Campbell, 3 Wheat, 212."

"So in Paine v. Hook, 7 Wall 425, it is said that:

"The equity jurisdiction conferred on the Federal Courts is the same that the high Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legistlation, and is uniform throughout the different states of the Union. To the same effect are the following cases:

Bodly v. Taylor, 5 Crnch, 191.

Watkins v. Holman, 16 Peters, 25.

Smith v. McCann, 24 Howe, 398, and Loring v. Downer, 1 McAll, 360.

"It is obvions to remark that this section, (referring to the 5th section of the act of Congress, of page 1, 1875,) excludes equity and admirality causes. The equity practice in the courts of the United States is not controlled by the legislation of the states, or rules of the state courts, but is prescribed by the Supreme Court."

"It follows from the terms of the 5th section of the act of June 1, 1875, and the authorities cited above, that if the relief sought by the defendant in this case is equitable relief, he cannot resort to the claim law of Georgia to secure it, for the mode of proceeding prescribed by that act is a legal and not an equitable proceeding."

Bloose v. Carlington, 92 U. S., 1, holds that the statute of June 1, 1875, does not effect the practice of this court in cases in equity.

"The acts of 1875 show an intention to secure in each state one method of precedure in all common law cases, and to attain the result by adopting, in general, the precedure of the state courts in the different states. Of course the distinction between law and equity is preserved, both in substance and in precedure, and the provisions of positive statutes of the United States are not involved, but in the absence of such provisions, the state practice prevails."

13 Blatchf, 227, Mills v. New Orleans, &c.

The first congressional enactment, so referred to, is in derogation of common law, at which nothing is better settled than that the remedy is governed by the lex fori, wherefore I will but refer to.

Remedies are governed by lex fori, which it prescribes to its own tribunals, and the form of action is as much a part of the *remedy* as is the time in which it is to be brought. The remedy in Virginia must be

brought within the time and in the mode, and according to the *descriptive* character of the instrument known to the *laws of Virginia*, and not by those prescribed in *another*. An instrument may be negotiable in one state and not in another, and the remedy must be in accord with the lex fori.

8 Peters, 371-372, Bank of U. S. v. Donaly.

35 Am. Decis. 296.

46 N. Y., 126 to 129, Lowry v. Juman.

18 Maine, 35, Drinkwater v. Portland &c.

While such enactment is so derogative, the second so referred to, restores to the rule of the common law already stated, the remedy, save in chancery and admiralty cases. Yet, and while the case at bar is an action at law, and unquestionably would be within such section, did the demurer present only the question of whether the proper common law remedy was being sought. I submit whether, as it presents, only the question whether it is at common law at all or only in chancery, the case is within such statute, as the test of whether it is properly brought, is whether it is only cognizable in chancery, because, if not, it necessarily is at law, and would be, had equity concurrent jurisdiction. It is immaterial whether the rule of the common law, or of either statute, governs, as, under either, the rule of this court, or of that of the state of Illinois, governing remedies, applies, and the decisions

of each are not only uniform, but equally so with those of each other, as already appears, and will, further hereafter.

The logic of 20 Wall, 527, Pollard v. Bailey, though holding that the remedy was exclusively in chancery, and presented below by defendant, and apparently relied upon more than any other case, as conclusively shows that the remedy in this case is at law, as it does that it was only in chancery in that, the cases are so different that each is as typical as can be of the respective jurisdictions.

No objection has been made to the substance or form of the declaration, yet, if it had been the subject of a bill in chancery, who would pretend that it would not have been subject to a demurer, while it it had been against a number less than all of the stockholders, alledging, also, that no one of the stockholders was responsible for the amount of the indebtedness, and showing that the remedy was not so effectual at law as in equity, and reasons for not making all of the stockholders defendants, it might not have been, yet, as none of such matters exist, such a suit could not be maintained, and consequently plaintiffs are without remedy save at law.

This suit being but the assertion of a legal right, created directly, independently and unconditionally, by a constitutional provision, imposing upon each stockholder in corporations and joint stock companies to the extent of his or her unpaid stock, the liability of such corporations and companies necessarily confers a like remedy for the recovery thereof, so if the corporation or company in which

defendant is a stockholder is liable in assumpsit for the goods and money furnished it by Patterson, one of the plaintiffs, and which they have used, on a claim therefor, which is undisputed, as in this case, except that in this a judgment has been obtained therefor, the defendant certainly is, and if such company is not so liable on a demand so simple and uncontroverted, especially after judgment therefor against it, which is also uncontroverted, no company or individual is in such a case, and consequently only in equity, for any indebtedness, if at all.

I refer to Pollard v. Bailey 20 Wall, 527, supra, as so typifying the two jurisdictions.

"After an examination of the several sections of their charter, it cannot for a moment be doubted that it was not only the intention to provide for a proportionate liability, but for a *pro rata distribution* of the fund arising therefrom among the different creditors according their several priorities. Every provision is entirely inconsistent with the idea that one creditor could, by an individual suit, appropriate to himself the entire benefit of the security, and exclude all others. A common benefit, to be collected and distributed by the receiver, who was made the common agent of all. There was no liability except for the deficiency. That was to be apportioned and collected for the common benefit.

"It was not only to be apportioned and collected, but the mode of apportionment and the manner of collection were specially provided for. The liability and

remedy were created by the same statute; this being so, the remedy is exclusive of all others. A general liability created by statute without a remedy, may be enforced by a common law action. But when the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed.'

"The provision for a proportionate liability is equivalent to a provision for an appropriate form of remedy of equitable action to enforce it. The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts. The cases from New York, cited upon the argument and supposed to be in opposition to the view we have taken, involved the consideration of such liability."

"In Bullard v. Ball, 1 Mason, 243, Justice Story says:"

"Whatever is enjoined by statute to be done, creates a duty on the party which he is bound to perform. When, therefore, a statute declares that, under certain circumstances, a stockholder in a bank shall pay the debt due from said bank, and those circumstances occur, it creates a direct and immediate obligation to pay it."

This case approves Bank of Poughkeepsie v Ibbotson, 24 Wend, 473 Simonson v. Spencer 15 Id 548, and Vanbook v. Whitlock 3 page 409, all holding it actions at law, are proper by distinguishing them from it, by which it virtually approves the decisions of such courts of that State, if they are, as I believe, uniform. Wherefore, I expect to refer to others of them.

by the court, none other could be pursued, and that on account of its complications, could be only in chancery. Yet, holding that where the remedy is not so provided for, and it is not in the case at bar, the remedy is at law. Independent of all such provisions, and the omissions thereof, in constitutional provisions or legislative enactments, creating the liability of stockholders, the distinction taken between the *complications* of the subject matter of that case, and the *simplicity* of that of such as this, demonstrates that that case is cognizable in equity, only, while such as this case, are at law, only.

In the case at bar, the liability is *direct*, to *each* creditor, the amount of which is fixed by the *indebtedness* of the company, not exceeding that of the unpaid stock of the defendant stockholder, and consequently ascertainable by a mere computation on such datum. In the case referred to in 20 Wallace, 527, there is no liability only for a *proportionate deficiency against all of the stockholders, and in favor of all of the creditors, but not to be recovered by them, nor any of them, but only by a receiver of the bank, as provided for in its charter, to be destributed, pro rata, among them; so the charter conferred no remedy on any of the creditors, only through a suit brought by the receiver, the mode of whose appointment, and of pursueing such remedy, is specially provided for in the statute, and therefore as held*

As further illustrating the subject of such jurisdictions, and approving 20 Wall., 527, supra, by distinguishing it from other decisions of this court, I refer to a more recent one, which is Hannor v. Henning, 93, U.

S., 232, made upon the 16th section of the general incorporation act of 1872 of Illinois, though also holding the remedy to be in equity.

"If the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." By which it is held that "The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery." That powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock; the amount which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also the number and names of the creditors; and the amount of their several debts; to determine the sum to be recovered of the trustees, and apportioned among the creditors, in a manner which a trial by jury and the rigid common law proceedings render impossible." And the court, after referring to numerous cases sustaining suits at law by a creditor against a stockholder, says: "It is sufficient to say that there is an obvious distinction between the liability of stockholders to the amount of their stock, which is a part of the obligation assumed when the stock is taken, and which is an exact sum, as ascertained by the number of the shares owned by the stockholder, and the case of managing trustees jointly liable for a violation of their trust to all the creditors of the corporation who may be injured thereby."

As further so illustrating such subject, and so approving 20 Wall., 527, supra, I refer to 101 U. S., 205 Hatch v. Doud.

"The liability of a subscriber for the capital stock of a company, is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his proissory note for the amount of his subscription. At law. certainly his subscription may be enforced against him without join der of other subscribers, and in equity, his liability does not cease to be several."

The court continuing, say that * * in Oglevie v. Knox Ins. Co., 22 How., U. S. 380, it is stated that "The creditors of the corporation are ssking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between the various stockholders, corporations or debtors. If A is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that those complainants might have got their satisfaction out of B as well." * * * The court further says that "The cases of Pollard v. Bailey, 20 Wall., 520, and Tany v. Tubham, 92 U. S., 176, are not in conflict with Ogilvie v. Knox Ins. Co. They are under statutory provisions imposing upon stockholders of banks a liability for the debts of the corporation, in proportion to their stock held therein. It was this liability beyond

the stock subscription that was sought to be enforced, and it was only a proportional liability; its extent could be ascertained only when the obligation of the other shareholders were taken into consideration. Hence it was ruled that the proper mode of proceeding was by bill in equity, in which an account of the debts and ock could be taken, and a pro rata distribution could be made."

In Peck v. Coalfield Co., 33 Bradwell, 623, Appellate Court of Illinois, as in this, it was contended that the only remedy was in equity, refers to 20 Wall., 527, as authority in holding that it was at law.

One of the four causes for demurrer in Case v. Galli, 94 U. S., 677, was "That the defendant is bound to contribute ratably, and that the proper amount can be ascertained only in equity." Held, that as the order was to collect the full amount of the stock, the suit must be at law, stating that it had been so conclusively held in Kennedy v. Gibson, et al., 8 Wall., 498, although in that case the suit was in equity, and maintained because in that the whole amount was not sought to be recovered, and the court in the case so referred say "Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is rdquired, the proceeding may be in equity."

In the case at bar the liability is limited by the amount of the subscription, and consequently is not ratable and the more easily ascertained, and clearly within jurisdiction at law.

While in Illinois River, &c., v. Bradley, 4 Transcript of U. S. S. C. Decisions. 392, decided at the last term of this court, a several decree was rendered against stockholders upon a statutory liability, it is apparent that for want of jurisdiction in equity, it would not have been had the suit been against them alone for a recovery on such liability, instead of the company, for the recovery of a decree against it for the amount of the indebtedness, and a lien on its property for the satisfaction thereof, and as incidental the reto for aseveral decree against each of such stockholders for his respective liability for such indebtedness, and it had not appeared, from the allegations of the bill, that suits at law against each of such stockholders would not have been so effectual a remedy as one in equity, because it is held that the court having jurisdiction in equity to enforce the lien, and that as incidental to render a decree against the corporation for the payment of the debt, and that it was consistent with the principles and practice of a court of eqnity, to so extend the relief as to avoid a multiplicity of suits, by giving complainant a simple and complete remedy, which is a virtual holding, that had the suit been in equity, against such stockholders, or any one or more of them, for the enforcement only, of such statuatory liability, there would have been no jurisdiction in equity, and if not in such a case, how could there be in this.

"Whenever a statute grants a new right or a new remedy for the violation of an old right, or whenever such rights are dependent on state statutes,or on acts of Congress, the jurisdiction between the law side and the equity side of the Federal Courts, must be determined

by the essential character of the case. Unless it comes within some of the recognized grounds of equitable jurisdiction, the remedy of the party is at law."

99 U. S., 378, Van Norden v. Merton, October term, A. D. 1848, which appears, and quotes at length from Thompson v. Rail Road Companies, giving citations thereof, and refers also to Kendig v. Dean, 97, U. S 423.

In that case, 99 U. S., 378, supra, the bill was dismissed for want of jurisdiction in chancery, and, although, as the court says, there was no fully recognized distinction between jurisdiction at law and in equity, in the forum of the court below, and such fact was urged as reason why the bill should have been dismissed, in connection with which it should be remembered that in no state in the Union has such a distinction been preserved to a greater extent than in Illinois, on which account the decisions of its Supreme Court should and I believe, does conform with those of this court, and should have the more force with it, especially as it is the lex fori.

The fact that the right sought in this case is statutory, and its want of any feature, much less an essential one of equitable jurisdiction, brings it within the rule of that case; while in Blair, et al v. Gray, 1 Millers' U. S., S. C., Reptr. 435, this court expresses no opinion as to whether it had jurisdiction at law; it is evident, but for want of an averment, that the losses of the corporation exceeded its means, without which no liability appeared,

it would have held that it had jurisdiction. The simplicity of the subject matter of this case requires no such averment, nor any following that of the indebtedness of the corporation, which creates a like one in plaintiff's favor, against each stockholder, in which respect it differs from most cases to which I have referred, or expect to, holding the remedy to be at law in which the liability remains contingent, after the creation of such indebtedness, and in some, only ratable.

As this court did in 20 Wall, 527, approve Bank of Poughkeepsie v. Ibbottson, 473; Simonson v. Spencer, 15 Id., 548, and Vanboob v. Whitlock, 3, page 409, and as 33 Conn., 516 gives a construction to the former, in accord with the rule of this court and of the state of New York, I here refer to such cases in connection with those already referred to, of this court, and, after referring to others of New York, will to some of the many of Illinois, on the subject, not only because all of this state are in accord with those of this court, but because it is the lex fori, and conclude by referring to some of a few of the many states, the decisions of which, on the subject, are in accord with all previously referred to:

"It was contended that the declaration should have been special, upon the special contracts which it was proved existed between the plaintiffs below and the Harlaem Canal Company. I apprehend that was not necessary. It was averred and proved, that the company was indebted to the plaintiffs for work and labor upon the Canal, and that payment had been refused by the officers of the company. That was sufficient."

"As to the remaining question, whether the action was maintainable at law. That an action may be maintained against a stockholder, under the circumstances mentioned in the Statute, cannot be denied; to deny it, would be to deny the authority of the Statute. The subscription, by the stockholder, was an assent on his part to assume all the liabilities imposed by the charter. An action will lie in this Court, unless there is some insuperable difficulty. It is said that partners cannot sue each other. These parties do not stand in the relation of partners to each other, and the fact of their being all stockholders, cannot present any valid objection to this suit. That a stockholder may enter into a contract with the corporation of which he is a stockholder, will not be denied, and, as they are seperate persons, in law, an action at law may well be maintained between them."

"The Statute creating the Harlaem Canal Company, does not imply that the equities between the parties are to be considered, and the language is: "And any person having any demand against said company, may sue any stockholder, singly, or any two or more stockholders, jointly, and recover, in any court having cognizance thereof." There is nothing here implying a liability in the other stockholders to contribution; there is no difficulty as to proper parties. If, indeed, equities do exist, which can only be adjusted in a court of chancery, tne defendant might have filed his bill for that purpose, but there was no such impediments appearing upon the case, as presented to us. We are therefore bound to say that the plaintiffs are entitled to their action in this court. The case of Bullard v. Bell, 1 Mason, 243, contained a full discussion,

both by the counsel and the court, of the principle, whether debt is a proper action to be brought in a case like this.

Mr. Justice Story says: "Whatever is enjoined by a "statute to be done, creates a duty on the party, which he "is bound to perform. Where, therefore, a statute declares "that, under certain circumstances, a stockholder in a "bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate ob- "ligation to pay it."

Simonson v. Spencer, et al. 15 Wend, 549.

"The charter does not confine the creditor to any particular remedy; it raises in his favor a debt against an individual, and leaves his remedy to the general methods of the law."

20 Wend, 614, Exparte, Van Riper.

4 Boser, 417, Woodruff v. Chittenden.

19 N. Y., 119, Eaton v. Aspinwall.

50 N. Y., Weeks v. Love.

1 Robert 391, Merchant's Bank v. Bliss.

3 N. Y., 166, Deapson v. Smith.

2 Davies, 119.

2 Hill, 265.

3 Hill, 188.

1 Comst. 47, Corning v. McCullough, approved by Hawthorne v. Calff, 2 Wall, 19.

57 N. Y., 331, Aspinall v. Sachi.

56 N. Y., 126, Lowry et al v. Inman.

14 Wend, 20, Spear v. Crawford.

24 Wend. 472, Bank of Poughkeepsie v. Ibbottson.

2 Sadf, Ch., 285, Mann, Receiver, v.

OF ILLINOIS.

80 Ills., 345, Butler v. Walker.

87 Id., 142, Tibballs v. Libby.

87 Id., 310, Fuller v. Ledden.

89 Ills., 25, Arenz v. Weir.

89 Id., 270, McCarthy v. Larosche.

96 Id., 135, Winoch v. Teerpen.

100 Id., Gulliver v. Roelle.

87 Ills., 310, Fuller v. Ledden.

57 N. Y., 331, supra., appears Aspinall v, Sachi., which holds that

"By the statute, ail of the shareholders are made individually liable for the debts of the company, and it is the same, in effect, as if every stockholder had executed a seperate bond, binding himself to pay the debt, upon the conditions specified in the act."

Gulliver v. Roelle, 100 Ills., 141.

Arenz v. Weir, 89 Id., 25.

Tibballs v. Libby, 87 Id., 142.

Fuller v. Ledden, 87 Id., 310, and Butler v. Walker, 80 Id., 345, were made upon the following statute:

"The trustees and corporators of any company, organized under this act, shall be severally liable for all debts or responsibilities of such company, to the amount, by him, or them, subscribed, until the whole amount of the capital stock of such company, shall have been paid in, and a certificate thereof, rendered, as hereinbefore provided."

In Arenz v. Weir, supra,, a receiver had been appointed for the ompany, but the court held that it did not effect the right of any creditor, to sue a stockholder, at law.

As is so well said by Justice Miller, in a case already referred to, whether the jurisdiction is at law or in chancery, depends esse tially upon the subject matter of the suit as is held by cases in New York, Connecticut and other states, referred to, which is but inevitable from the subjects of the respective jurisdictions, regardless of whether it is stated, in the statute, that the "stockholders" are bound, or that each of them are personally and individually bound, as held in cases to which I have referred and, as in either case, the liability being only for the ammount subscribed for by each stockholder, is, necessarily, several.

DECISIONS OF CONNECTICUT AND OTHER STATES.

33 Conn., 516, Raines v. Steuart.

3 Id., 52, Southland, et al v. Russ, et al.

16 Conn., 368, Beardsley v. Smith.

1 Mason, U. S. C. C. R., 243, Bullard v. Bell, by Story, J.

19 Ga., 325, Adkins v. Thornton.

22 Id., 86, Force, et al v. Dahlonega.

47 Maine, 530, Ingalls v. Cole.

47 Vermont, 313, Basset v. St. Albans.

45 Penn., state, 410, Patterson v. Arnold.

34 Md., 485, Norris v. Johnson.

34 Cal., 503, Dowdson v. Ranken.

14 La., Ann., 828, Liquidator of &c., v. Clinton &c.

Flash, et al v. Conn. S. C., Fla.

The subject matter of this suit is so clearly cognizable at law only while it would be immaterial were it in equity also, that many of the decisions referred to under devisions 1 and 2, apply equally to the remedy which is division 3. All which is respectfully submitted,

F. W. PACKARD,

Attorney for plaintiffs in error.

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OFFICE SUPREME COURT U. S.
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JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT of the UNITED STATES.

JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWN,
Plaintiff in Error,
v.
CORNELIUS LYNDE, JR.,
Deft. in Error.

No. 122.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument for Defendant in Error.

BY
CHARLES M. OSBORN,
DEFENDANT'S ATTORNEY.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

IN THE

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JAMES PATTERSON, FOR THE USE OF THOMAS J. BROWN,
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v.
CORNELIUS LYNDE, JR.,
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No. 122.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AND POINTS.

James Patterson, who sues for the use of Thomas J. Brower, claiming to be a judgment creditor of the Burnt River & Malheur Consolidated Ditch and Mining Company, a corporation organized under the general laws of the State of Oregon relating to private corporations, filed his declaration in this cause to enforce in an action at law against the defendant, a liability, which he claims to exist in his favor, by reason of an alleged indebtedness to the company for unpaid stock subscriptions; and bases his right to maintain an action at law against the defendant, for the application of this alleged indebtedness on his

judgment, upon the following constitutional and statutory provisions of the State of Oregon:

Section 3 of Article 2: "The stockholders of all cor-"porations and joint stock companies shall be liable for "the indebtedness of said corporation to the amount of "their stock subscribed and unpaid, and no more."

Section 14 of the Act under which this corporation was organized: "All sales of stock, whether voluntary "or otherwise, transfer to the purchaser all rights of "the original holder or person from whom the same is "purchased; and subject such purchaser to the payment of "any unpaid balance due or to become due on such stock. "But if the sale be voluntary, the seller is still liable to "existing creditors for the amount of such balance, unless "the same be duly paid by such purchaser."

The declaration alleges the incorporation of the company under the general laws of Oregon, and that the capital stock was fixed at 2,000 shares of a par value of $500 each, making the stock in all $1,000,000.

That the defendant subscribed in 1871 for 200 shares of the capital stock of this company, upon which he paid $30,000, and became indebted to the corporation in the sum of $70,000.

That afterwards the corporation became indebted to the plaintiff, and on demand refused to pay the debt, and that the plaintiff, on June 6, 1873, in and to the vacation of the Circuit court of Baker county, commenced suit against the corporation, and summons was issued, returnable within ten days from date of service; that the company made default, and that the plaintiff, on August 2, 1873, *made application in said vacation* to the clerk of said court for judgment against the defendant, and that

the clerk, in the vacation of said court (Rec., 18), entered judgment in favor of the plaintiff, against the company, for the sum of $50,897.36, which he assigned to Brower.

That two executions, issued on this judgment, had been returned *nulla bona*, and the judgment still remains unsatisfied. The declaration sets out (Rec., 23, 24) *in hæc verba* the constitutional and statutory provisions under which the plaintiff seeks to bring his action, and concludes: that "*by reason of the premises, and by virtue of*" these constitutional and statutory provisions, the defendant is individually liable to the plaintiff to the amount of the judgment, and being so liable, promised, etc.

The pleader improperly introduced into the declaration a number of statements of evidence on which he, perhaps, intended to rely on the trial, as proof of the facts alleged. These I have purposely omitted in this statement, as they are merely surplusage, and so not confessed by the demurrer.

To this declaration the defendant (Rec., 28) interposed a general demurrer, which was sustained by the court below, "*the court* (Rec., 30) *being of opinion that the "plaintiff's remedy, if any, is in equity, and not at law,*" and judgment was entered dismissing the cause at plaintiff's costs.

From this judgment the plaintiff prosecutes this writ of error.

The opinion of the court below being with the defendant on the first point raised by the demurrer, the discussion of any other point was unnecessary, and this may have led appellant to misconceive the issues which we propose to discuss in this argument.

Two objections to the declaration are properly raised by this demurrer.

First. Under this constitutional provision, can a judgment creditor of the corporation recover in an action at law against a stockholder the amount due on the latter's subscription to the stock of the corporation for the purpose of applying such amount on the debt due from the corporation to him?

Second. Did the clerk of the Circuit court of Baker county, Oregon, have jurisdiction in the vacation of that court to render a judgment by default against the corporation? And is such a judgment so rendered a judicial proceeding of Oregon, entitled to faith and credit in this court?

ARGUMENT.

First Point.

I.

UNDER SECTION 3, ARTICLE 11, CONSTITUTION OF OREGON, AND SECTION 14 OF THE GENERAL LAW OF OREGON, UNDER WHICH THIS CORPORATION WAS ORGANIZED, THE PLAINTIFF'S REMEDY IN THE OREGON COURTS WOULD BE IN EQUITY AND NOT AT LAW.

Such was the decision of the Circuit court for the Northern District of Illinois made in this case when the question was an open one in the courts of Oregon. Since that time the Supreme court of Oregon, the highest tribunal of that state, has announced that it holds the same opinion, and has furthermore rendered its official judgment, authoritatively construing the provisions of the constitution and the law involved in this case in exact accordance with the view expressed by the learned judges, who in the Circuit court heard and decided this cause on demurrer.

The cause, to which I refer as an authoritative construction of the question involved in the case at bar, is entitled *Bush* v. *Cartwright*, reported in volume 7, Oregon Reports, page 329.

The plaintiff, Bush, alleged in his complaint that the Pioneer Oil Company was, on the 20th day of April, 1873, indebted to him in the sum of $40,000, and on that day defendant, Cartwright, voluntarily sold 140 shares of the stock of the corporation of which he was the owner;

that there remained unpaid on this stock at the commencement of the suit the sum of $8,400, for which plaintiff demanded judgment in part satisfaction of the debt due him from the corporation.

It appears that the corporation was organized under the identical act under which the corporation involved in the case at bar was organized, and the plaintiff in his complaint set out the same constitutional and statutory provisions as in the case at bar, and based on them his right of action.

The court below sustained a demurrer to this complaint.

On appeal, the Supreme court, after referring to the fact that the complaint was insufficient, because it did not aver a demand on the purchaser of the stock, or that plaintiff had exhausted his remedy against the corporation, held that the remedy in the case was one which existed for the benefit of all creditors, and against all stockholders, who were only secondarily liable, and only liable for the *pro rata* amounts necessary to pay the debts of the corporation after its assets had been applied for that purpose; and therefore it must be pursued in equity, and could not be at law.

On page 335 it says:

"The next question presented for our consideration is "whether the individual liability of a stockholder to exist-"ing creditors of the corporation may be enforced by an "action at law, or whether a suit in equity must be resorted "to. It is insisted by counsel for appellants, that the "remedy is at law, and to maintain the proposition, "*Corning* v. *McCullough*, *Simonson* v. *Spencer* and *Bank* "v. *Ibbotson* (New York cases) are cited. We have ex-

"amined these cases, and find that the statutes under "which they are maintained are very different from ours. "* * * (p. 336.) But, upon the other hand, we find "that there are many cases in which it has been held that "the remedy is in equity, where the rights of the corpo- "ration, the stockholders and creditors, can all be adjusted "in one suit, upon the principles of equality and justice. "And as the views presented in those cases recommend "themselves to our consideration as the most reasonable "and appropriate, we have concluded to adopt them."

"(Citing: 19 Johns., 484; 8 Cow., 395; 20 Wall., 520; "14 Wis., 762; 1 Hopk., 305; 23 Pick., 112.)"

"In the last authority above referred to, it was held that "an action at law could not be maintained."

It then quotes from the language of the court in that case: "* * * In such case there must either "be a *pro rata* division among the creditors of what may "be recovered, which would be impracticable in suits at "law, or those who sue first must recover the whole of "their debts, leaving others totally remediless, which would "be palpably unjust. The evils and inconveniences of "attempting to enforce this section by suits at common law "would be incalculable, and such remedy would be inad- "equate, vexatious and mischievous. The only proper "means of giving effect to this provision is by a process in "equity, and this, of all cases which can arise, seems to call "most loudly for a chancery jurisdiction.

"To a bill in equity all persons, however numerous, "might be made parties; and all the relative and conflict- "ing claims of the many creditors and stockholders settled, "and their proportionate rights to recover and liabilities to "contribute adjudged in a single suit; we are all, therefore,

"of opinion that this case comes within the equity jurisdic-
"tion of the court, and that an action at law will not lie."
And the court concludes:

"*Being of opinion that the views expressed in the case*
"*above are correct, we adopt them as applicable to this*
"*case.*"

It will be found impossible to state any fact appearing in that case which will distinguish it in principle from the case at bar, so as to avoid the effect of this authoritative construction of the constitution and law of Oregon as applied to this case. If the plaintiff here had proceeded against this defendant in the courts of Oregon he must have proceeded in equity, and could not have proceeded at law; and this is because the redress to which the plaintiff is entitled cannot be administered by a court not possessing the power of a court of equity,—a power which is not possessed by a court of law, viz: the power to draw to itself and determine the entire controversy between all parties in interest.

The Supreme court of Oregon having thus construed these provisions of the Oregon constitution and statutes and the remedies granted thereby, it is hardly necessary to cite authority to support the statement that this court will in this case adopt and follow the decision of the Oregon court.

It may not, however, be amiss to quote the language of this court in the late case of *Fairfield* v. *County of Gallatin*, 100 U. S., 52: "At an early day it was an-
"nounced that in cases depending upon the constitution or
"statutes of a state, this court would adopt the construc-
"tion of the statutes or constitution given by the courts
"of the state, when that construction could be ascertained."

In this case appellant's right to maintain his suit depends on the construction to be given to this constitutional provision, and this construction is ascertained by a decision of the court of final resort of the state, rendered on the first and only occasion where its attention has been called to the subject, and in a case in which a construction of the constitution and law was necessarily involved.

The court will observe that counsel for plaintiff in error makes no mention of this authoritative decision of the Oregon court. Whether this omission is owing to its having escaped his notice in his examination of the law on this subject or to his inability to meet its force, we can not tell. His argument, however, seems to indicate that he had an acquaintance with the construction of the Oregon constitution by the Oregon court, because he seeks to establish the proposition that the form of the action and the forum, in which the liability under this constitutional provision of a stockholder for the corporation's indebtedness is to be enforced, should be determined by the *lex fori*, for the reason, as he says, that it is merely a question of remedy.

But even were this proposition correct, the policy of the law, as evidenced by the decisions of the courts and as pronounced by the statutes, would require that in Illinois under the facts in the case at bar, the defendant's liability should be enforced in equity.

Revised Statutes Illinois, approved April 17, 1872, Ch. 32, § 25: "If any corporation * * shall allow "any execution or decree of any court of record, for pay- "ment of money, * * to be returned, 'no "property found,' * * * suits in equity "may be brought against all persons who were stock- "holders at the time * * by joining the cor-

"poration in such suit; and each stockholder may be "required to pay his pro rata share of such debts * * "to the extent of the unpaid portion of his stock, after "exhausting the assets of such corporations. * *"

In *Richardson* v. *Akin*, 87 Ill., 138, the court holds that the liability of a stockholder for an indebtedness of the corporation, accrued since the adoption of this statute, could only be enforced in equity; and that a court of law did not have jurisdiction over a suit brought by a creditor against the stockholder.

And without making a lengthy reference to the decisions of the Illinois courts, we do not hesitate to say that actions at law against a stockholder have only been allowed at suit of a creditor of a corporation in two classes of cases: (1) to enforce a liability created by a statute of the following nature: "All stockholders * * "shall be severally individually liable * * to "an amount equal to the amount of stock held by them, "for all debts made * * prior to the time when "the whole amount of its capital stock shall have been "paid in, etc."

Corwith v. *Culver*, 69 Ill., 502.
Butler v. *Walker*, 80 *id.*, 345.
Tibbals v. *Libby*, 87 *id.*, 142.

But the liability under such a statute is "*in the nature* "*of a penalty* to enforce the prompt and literal compli- "ance with the law in the organization of the corporation," as the court says in *Richardson* v. *Akin*, 87 Ill., 138; and this penalty must be enforced at law by individual creditors, each for himself.

Lane v. *Nickerson*, 99 Ills., 287.

Or (2) to enforce a liability created by statutes of this

nature: "Each stockholder shall be liable to double the "amount of stock held or owned by him. * *"

McCarthy v. *Lavasche*, 89 Ills., 270.

But this liability is primary, individual and several, and existing from each stockholder to each creditor, and no part of the assets of the corporation.

Fuller v. *Lidden*, 87 Ills., 310.
Wincock v. *Turpin*, 96 Ills., 139.

The principles established by these Illinois statutes and the practice under them, is that where the amount to be recovered by the creditor is a part of the assets of the corporation, the corporation must be a party, and the action must be in equity; but where the amount for which the stockholder is liable is no part of the assets of the corporation it is not a necessary party; and if the amount goes solely to the creditor suing, he may proceed at law, and therefore, under the facts of the case at bar, the *lex fori* would require that the plaintiff seek his remedy in equity.

But counsel errs in asserting that it is a mere question of remedy, to be determined by the *lex fori*. On the contrary, it is a question of the nature of the liability imposed upon the stockholder by the Oregon constitution, or assumed by him under that constitution; and the nature of this liability and the person in whose favor it exists, must be determined by the Oregon court. The defendant is presumed to have become a stockholder of this Oregon corporation, subject to the liability imposed upon stockholders by the Oregon laws. This liability, counsel erroneously asserts, is direct, independent, unconditional and primary, and running directly from each stockholder to each creditor; but the Oregon laws, under which the

liability arises, fix the limits of defendant's obligation, and in the case above cited, it is held to be a secondary liability; one that can only be enforced when the remedy against the corporation has been exhausted, and one which exists in favor of all creditors, and which must be enforced for the benefit of all.

It says (p. 334): "But again, can a creditor of a cor- "poration proceed in the first instance against a stock- "holder upon his individual liability without first having "shown that he has exhausted his remedy against the "corporation? We think not. The contracts being made "with the corporation, there is no privity of contract "between creditors and stockholders."

Plaintiffs' rights can only be enforced in a court of equity, because no other courts have the powers necessary to determine the amount of the liability and enforce the remedy without injustice to the defendant, and to the other creditors.

This demurrer must be sustained, not because plaintiff misconceived his remedy, but because he misconceived his rights.

II.

THE DOCTRINE OF JUDICIAL COMITY WILL NOT PERMIT THE PLAINTIFF, WHO IS SEEKING TO ENFORCE A LIABILITY THAT ARISES UNDER THE LAWS OF OREGON, TO BRING IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, AN ACTION AT LAW, WHEN IN THE OREGON COURTS HE COULD ONLY SUSTAIN A BILL IN EQUITY, BECAUSE THEREBY HE WOULD OBTAIN AN ADVANTAGE WHICH HE COULD NOT HAVE UNDER THE LAWS

OF OREGON, AND WOULD SUBJECT THE DEFENDANT TO A LIABILITY WHICH COULD NOT BE ENFORCED UPON A STOCKHOLDER RESIDENT IN THE STATE OF OREGON.

Ericson v. *Nesmith*, 15 Gray, 221.

In this case the court says: "The laws of foreign "states do not operate or have force here *ex proprio* "*vigore*, but only *ex comitate*. The courts of a state where "the laws of a foreign state are sought to be enforced "will use a sound discretion as to the extent and mode of "exercising this comity. *They will not suffer* * * "*their tribunals to be used for the purpose of affording* "*remedies which are denied to parties in the jurisdiction of* "*the state that enacted the law.* * * *"

And in that very case the court refused to allow an action at law to be brought to enforce a liability on the part of the stockholder, for the corporation's debts, arising under a statute of the State of New Hampshire, which provided that the remedy, under the statute, should be in equity. To allow an action at law to be brought in its courts, would, it held, subject the stockholders residing in Massachusetts to a greater burden than that imposed on those residing in New Hampshire, since the former would be obliged to bring separate suits for contribution, while the latter would have their equities adjusted in one suit, in which the corporation, the stockholders and the creditors could all be made parties, and their conflicting interests could be equitably adjusted.

So in the case at bar, the Supreme court of Oregon holds that the remedy under these provisions of its constitution and statutes is in equity; the plaintiff cannot come into a foreign court and seek a remedy in an action at law, which would not be allowed him in the courts of

Oregon, under whose laws he claims his right of action. His utmost claim must be that such rights be granted him in this court as he could have in the Oregon courts.

III.

THE CONSTITUTIONAL PROVISION THAT "THE STOCK-"HOLDERS OF ALL CORPORATIONS AND JOINT-STOCK COM-"PANIES SHALL BE LIABLE FOR THE INDEBTEDNESS OF "SAID CORPORATION TO THE AMOUNT OF THEIR STOCK "SUBSCRIBED AND UNPAID, AND NO MORE," MERELY DECLARES THE PRINCIPLE WHICH EXISTED INDEPENDENTLY OF THE PROVISION, AND LIMITS THE POWER OF THE LEGISLATURE TO IMPOSE BURDENS BEYOND THE AMOUNT OF THEIR SUBSCIPTIONS ON THOSE WHO SHOULD BECOME STOCKHOLDERS OF OREGON CORPORATIONS.

IT DOES NOT CREATE ANY NEW RIGHTS OR NEW REMEDIES, BUT LEAVES THE AMOUNT DUE ON STOCK SUBSCRIPTIONS A TRUST FUND, TO BE COLLECTED AND APPLIED FOR THE BENEFIT OF ALL CREDITORS OF THE CORPORATION, BY SUCH PROCESS AS SHALL BE FOUND APPROPRIATE TO EFFECTUATE THAT END.

It follows that, independently of the construction given by the Oregon courts to the constitution and statute in question, the suit must be in equity, and not at law.

The capital stock of a corporation, in whatever form it may be found, whether paid in and invested in property or outstanding in the hands of the subscribers, is a *trust fund for the protection of the general creditors of the corporation.*

Bush v. *Cartwright*, 7 Or., 333.

"Perhaps to this same head of implied trusts * * "we may refer that class of cases where the stock and "other property of private corporations is deemed a trust "fund for the payment of the debts of the corporation; "so that the creditors have a lien or right of priority of "payment on it in preference to any of the stockholders "in the corporation; * * the creditors may enforce "their claims against any property belonging to the cor- "poration, * * for such property will be held affected "with a trust, primarily, for the creditors of the company, "and subject to their right, secondarily, for the stock- "holders, in proportion to their interests therein."

Story's Eq. Juris., § 1252.
Wood v. *Dummur*, 3 Mason, 308.
Vose v. *Grant*, 16 Mass., 505.
Hatch v. *Dana*, 101 U. S., 215.

In *Sawyer* v. *Hoag*, 17 Wall., 620, the court says:

"Though it be a doctrine of modern date, we think it "now well established, that the capital stock of a cor- "poration, especially its unpaid subscriptions, is a trust "fund for the benefit of the general creditors of the cor- "poration."

This trust fund is for the benefit of all of the creditors; it must be applied ratably in the payment of all of the debts, and the liability is proportionate among all the subscribers for stock, who owe this fund. One creditor cannot obtain an advantage by superior diligence.

Sawyer v. *Hoag*, 17 Wall., 610.
Lawrence v. *Nelson*, 21 N. Y., 158.
Scammon v. *Kimball*, 6 Ch. L. News, 1.

Therefore, the fund can only be reached by the creditor in a suit in equity, when all of the creditors of the corpo-

ration, all of the debtors to the fund, and the corporation itself, can be made parties.

In the section quoted above from Story's Eq. Juris., § 1252, the author continues: " * * This, however, is "a remedy which can be obtained in equity only, for a "court of common law is incapable of administering any "just relief, since it has no power of bringing all the par- "ties before the court, or of ascertaining the full amount "of the debts, the mode of contribution, the number of "contributors, or the cross equities and liabilities, which "may be absolutely required for a proper adjustment of "the rights of all parties, as well as of the creditors."

Spear v. *Grant*, 16 Mass., 9.
Vose v. *Grant*, 15 *id.*, 506.
Thompson—Liability of Stockholders, §§ 258, 259.
Hatch v. *Dana*, 101 U. S., 215.
Coleman v. *White*, 14 Wis., 700.
Ward v. *M'fg Co.*, 16 Conn., 601.

The peculiar incidents that result from this equitable doctrine that the capital stock is a trust fund for the general benefit of the creditors, are that the benefit of this fund belongs to all the creditors, and that the stockholders are entitled to have a just and equitable contribution pro rata made for payment of the debts. From these it follows that the suit must be brought in behalf of all the creditors, and all the subscribers should be made parties, in order that the rights and liabilities of all may be equitably adjusted in one suit. And because the fund, which the creditors seek to subject to the payment of their claims, is the capital stock of the corporation, it must be made a party to the cause. The only exception to this, if there is any, is where the corporation has ceased to exist.

And though in some of the later cases in this court, it has been stated that all the subscribers need not be made parties defendant, because the liability to the corporation for unpaid stock subscriptions is several, yet the court points out the fact that the defendants in such a bill can have all other stockholders made parties by filing a cross-bill, and thus have contribution enforced in the one suit, and a multiplicity of suits will be avoided (*Hatch* v. *Dana*, 101 U. S., 215; *Oglivie* v. *Knox Ins. Co.*, 22 How., 380,) which of course can only be done in equity.

The constitution of Oregon declares that "the stockholders" shall be "liable for the indebtedness of the corporation" to the extent of their unpaid stock subscriptions, and no more. This is a mere statement of the equitable liability; it is for the benefit of all the creditors of the corporation, *i. e.*, for its entire indebtedness; all the stockholders who owe subscriptions for stock are pro rata liable, and equity will enforce contribution among them; and the extent of the liability is the amount of capital stock in their hands. Its incidents, therefore, are the same, and it should be enforced in the same manner and in the same forum; the suit must be in behalf of all the creditors, and all the stockholders and the corporation should be made parties.

This provision, therefore, falls within the class of statutes, which "are merely declaratory of the common law," and "attach to the stockholder no other or greater liabil-"ity than that which ataches to him under the principles "of equity."

Thompson's Liab. of Stockholders, § 25.

Of the same class as the statute under which a creditor's bill was filed in *Pierce* v. *Mil. Const. Co.*, 38 Wis., 253, of which this court says in *Hatch* v. *Dana*, 101 U. S.,

212: "This was a proceeding under a statute, *but it was "a statute enacting substantially this equity rule.*"

(Vide also *Mann* v. *Pentz*, 3 N. Y., 422.)

Therefore, independently of the construction which the Oregon court has placed on this provision of its constitution, the plaintiff's remedy is in equity, and not at law. Jurisdiction in equity over this class of cases has never been questioned, and every such court affords a complete relief.

But not a single case can be found that warrants bringing an action at law by the creditor against a stockholder, who is indebted to the corporation for stock subscriptions. On the contrary the courts have refused to allow an action at law in such case for the distinct reason that the remedy is in equity.

Spear v. *Grant*, 16 Mass., 9.
Vose v. *Grant*, 15 *id.*, 506.
Harris v. *First Parish*, 23 Pick., 112.
Coleman v. *White*, 14 Wis., 700.
Bush v. *Cartwright*, 7 Or., 329.
Mann v. *Pentz*, 3 N. Y., 422.

In contrast with cases in which creditors have sought to enforce this equitable liability for unpaid stock subscriptions, are a large number of cases in which actions at law have been brought by creditors against stockholders of a corporation, based upon a pure statutory liability.

The distinction between the latter class of cases and the case at bar lies in the nature of the liability. A pure statutory liability for the debts of the corporation exists independently of the corporation, forms no part of its assets, cannot be enforced by it or by its receiver for the

benefit of the creditors, but it is a new, independent and primary liability created by statute, and the right to enforce it usually vests directly in each creditor for his individual benefit and to the extent of his debt against the corporation.

It is not necessary to refer to the many cases of this nature cited by counsel. They each differ from the case at bar in respect to the liability, to enforce which they are brought. The statutory provisions in this regard of the different states, are so various in their character, that the decisions of the courts in construing them and giving them effect, have practically but one element in common. Each of these varying causes of statutory liability is held to be a primary obligation of each stockholder to each creditor, wholly independent of the corporation.

It may be that the legislature might give to the creditor the power to appropriate to himself a debt due to the corporation, independently of the other creditors. The fundamental error which appellant makes is in assuming that the constitution of Oregon has done this.

But when a statute makes the stockholders "severally "individually liable *to the creditors* of the company," this liability exists "not to some particular creditor, but to all "the creditors," and "relief could only be had on a bill "brought by or in behalf of all the creditors of the "corporation."

Horner v. *Henning*, 93 U. S., 228.
Harper v. *Union Mfg. Co.*, 100 Ill., 231.
Low v. Buchanan, 94 Ill., 76.
Smith v. *Huckabee*, 53 Ala., 191.

When the statute makes the stockholders *liable pro rata* for the debts of the company, although the liability

may exist in favor of each creditor separately, the relief must be sought in equity, because only a court of equity can ascertain the amount which each stockholder is liable to pay, and can enforce contribution.

In *Umstead* v. *Buskirk*, 17 Ohio St., 114, which was a suit in equity to enforce the liability of certain stockholders under a statute which provided that the stockholders should be individually liable to the amount of their stock, "for the purpose securing the creditors," the language of the court, on page 118, is a very clear statement of the respective rights of the stockholders and creditors, and of the principle on which equity enforces contribution.

It says (page 118):

"The liability on the part of the stockholder is several "in its nature, but the right arising out of this liability is "intended for the common and equal benefit of all the "creditors. The suit of a creditor under this statute, "should, in our opinion, be for the benefit of all the cred-"itors; and the stockholders whose liability is sought to "be enforced, have the right to insist on their co-stock-"holders being made parties for the purposes of a general "account, and to enforce from them contributions in pro-"portion to their shares of stock.

"*The right of contribution grows out of the organic "relation existing among the stockholders. As between "them and the creditor, each stockholder is severally liable "to all the creditors; as between themselves, each stock-"holder is bound to pay in proportion to his stock.*

"The corporation ought to have been made a party."

Matthews v. *Albert*, 24 Md., 538.
Crease v. *Babcock*, 10 Metc., 531.
Harris v. *First Parish*, 23 Pick., 112.
Adler v. *Brick Co.*, 13 Wis., 63.

Therefore, to warrant an action at law, even to enforce a statutory liability, the liability of the stockholder must be several and individual, in favor of each separate creditor; even in such a case there is a concurrent remedy in equity (*Bank* v. *Ibbotson*, 24 Wend., 473), and "the remedy "at law" is said to be "a very imperfect one."

Van Hook v. *Whitlock*, 3 Paige Ch., 409.

For these reasons, in the case at bar, the remedy is in equity. Regarding the provision of the constitution as *creating* a statutory liability (which, even for the argument's sake only, I am unwilling to admit), even then the remedy must be in equity, because it is for the general benefit of all the creditors, and it is such a liability as should be enforced on the stockholders *pro rata*. The suit should be brought on behalf of all the creditors, all the stockholders and the corporation should be made parties, and the rights and liabilities of all parties interested be equitably adjusted.

Bush v. *Cartwright*, 7 Oregon, 329.

Second Point.

In whatever forum the plaintiff may proceed to subject to the payment of a debt, claimed by him against the corporation, an indebtedness due to the corporation from defendant, it is necessary for the plaintiff to show by a judicial determination against the corporation that he is its creditor to the amount which he seeks to recover.

This follows from the nature of the plaintiff's right to recover at all. He does not seek to recover on the

ground that the defendant is indebted to him, but on the ground that a third person (the corporation) is indebted to him, and that the defendant is indebted to the corporation. If the plaintiff's action is in equity, it is in the nature of a creditors' bill, the foundation of which is almost invariably a judgment at law, because a court of equity will not, unless in very exceptional cases, assume jurisdiction to pronounce a judgment for damages upon a breach of contract.

If, on the other hand, his action is at law, it is in the nature of a garnishment, and there must first be a judgment against the plaintiffs' debtor, and this he could not have in the form of action adopted in this case, because the corporation is not a party to the action.

The reason that the plaintiff must first have judgment seems to be that whether he proceeds in law or in equity, by his action he has execution against the corporation, and this he can only have after a judicial determination that the debt is due to him, while if he could proceed without judgment, he would have execution against his debtor without giving this debtor an opportunity to show that the amount claimed was not due.

An unsatisfied judgment against the debtor corporation as a condition precedent to the right to bring suit against stockholders of the corporation is only dispensed with in cases where the liability created by statute is primary and runs directly to the creditor, and forms no part of the corporation's assets. In such cases the action is brought to recover moneys which do not belong to the corporation, and the action is in no sense in the nature of an execution against the corporation.

The necessity for a judicial determination of the debt in cases where it is sought to subject assets of the corpo-

ration to the payment of the debt, as well as a possible exception to the rule is stated in *Terry* v. *Anderson*, 95 U. S., 636, and I presume that it is so well established that it will hardly be questioned.

But it will be contended that the constitution of Oregon has changed the rule in these cases and made the debtor to the corporation upon unpaid stock subscriptions primarily liable to the creditor of the corporation, and that because of this constitutional provision he may sue such debtor as if the promise were directly to himself.

I have already said that this provision of the Oregon constitution is merely a declaration of the principles of the common law. It seems to have been intended rather to limit the power of the legislature as to the liabilities of stockholders than to confer new rights on the creditors of corporations, and if it were an open question, I do not think that this court would hesitate as to its proper construction, but it is not, as I think, an open question, in view of the case already quoted from, *i. e. Bush* v. *Cartwright*, 7 Oregon, 329.

The Supreme court of Oregon has, as I think, determined the construction of the constitutional provision and statute in this respect to be that the defendant's liability is secondary and conditional on failure of the creditor to make his debt out of the assets of the corporation.

On pages 334 and 335 it says:

"But again, can a creditor of a corporation proceed in "the first instance against a stockholder upon his indi- "vidual liability without first having shown that he has "exhausted his remedy against the corporation? We "think not."

For the reason, that there is no privity between the

creditor of the corporation and the debtor of the corporation.

I therefore submit that the declaration was obnoxious to demurrer, on the ground that the judgment which the plaintiff sets out appears on the face of the declaration to be absolutely null and void.

I.

THE JUDGMENT SET OUT IN THE DECLARATION WAS RENDERED BY THE CLERK OF THE COURT, AND WAS THEREFORE VOID BECAUSE NOT RENDERED BY A JUDICIAL OFFICER. IT WAS RENDERED IN VACATION OF THE COURT, AND WAS THEREFORE *coram non judice.*

Hall v. *Marks*, 34 Ills., 362.

(Rec., 18.) The declaration alleges "that on the 6th "day of June, 1873, said Patterson, *in and to the vacation* "*of the Circuit court of said county, after the May term* "*thereof, A. D. 1873*, which was begun * * on the "19th day of May, 1873, and * * continued until its "termination, *which was on the 28th day of May, 1873*, " * * commenced a suit against said company by "filing a complaint against it."

That in the summons issued in this suit, it was stated that the defendant should appear and answer within ten days from date of service, if served in the county in which suit was brought; if in any other county of Oregon, within twenty days; and that if it did not so answer, the plaintiff would take judgment against it for the sum demanded. That this summons was duly served on June 7; that the company did not within ten days from service answer the complaint.

"That said defendant having failed to answer within "such time, * * said Patterson, * * on August "2, 1873, *made an application in writing in said vacation "to said clerk of said Circuit court for a default against "such company, * * and for judgment thereupon in "his favor.* * *" And that "*a default and judg-"ment was entered in said suit in vacation by such clerk of "said Circuit court,* * *" which the plaintiff sets out *verbatim.*

The plaintiff having thus particularly set out the various steps, which were taken by him to obtain his judgment, the time at which and the person by whom it was rendered, these allegations of the declaration show as distinctly as possible that the pretended judgment on which he seeks the application of the defendant's alleged indebtedness for unpaid stock subscriptions was rendered by a person who had no jurisdiction over the cause, and at a time when the cause was *coram non judice*, and is, therefore, void; and this matter is open to examination on this demurrer. For although the general rule is that a judgment cannot be attacked collaterally, yet it is void, and may be so attacked, when rendered without jurisdiction either of the subject matter or the person.

Christmas v. *Russell*, 5 Wall., 291.
Thompson v. *Whitman*, 18 *id.*, 457.

And when rendered without jurisdiction it is not entitled to faith and credit out of the jurisdiction in which it was rendered.

D'Arcy v. *Ketchum*, 11 How., 165.
Pennoyer v. *Neff*, 5 Otto, 714.

(*a*) *The clerk of the Circuit court of Baker county, Oregon, had not jurisdiction over a cause pending in that*

court, and any judgment rendered by him in such cause is void.

The constitution of Oregon provides as follows:

Art. III. "The powers of the government shall be "divided into three separate departments—the legislative, "the executive and the judicial; and no person charged "with official duties under one of these departments shall "exercise any of the functions of another. * * *"

Art. VII, § 1. "The judicial power of the state shall "be vested in a Supreme court, Circuit courts and "County courts * * having general jurisdiction * * "in accordance with this constitution. * *"

This vests in the courts and magistrates named the entire judicial powers of the state.

Martin v. *Hunter's Lessees*, 1 Wheat., 330.

The Circuit court, therefore, alone had jurisdiction of the subject matter of plaintiff's suit with the corporation; and unless the clerk had, *virtute officii*, the judicial powers of the court vested in him, he could have no power to render a valid judgment.

To avoid the possibility of confounding the legal signification of, and of mistaking the person marked out by, the word "court," in which the constitution vests the judicial powers, the code of Oregon, for the purpose of defining clearly the person who should exercise those judicial powers, states (Chap. XI. T. V., § 886): "A judicial "officer is the person *authorized to act as a judge in a "court of a justice.*"

The judge, therefore, of the court has sole power to exercise the judicial functions of the court, and he alone

has jurisdiction over a cause pending in that court, *i. e.*, "power to hear and determine it."

The judgment sued on in the case at bar was rendered by the clerk of the court, in accordance with the provisions of the civil code of Oregon, Ch. 2, T. 12, § 246, which provides that "judgment may be had upon failure "to answer. 'When the time for answering has expired, "and it appears that the defendant * * has *been duly* "*served* with the summons, and has failed to answer the "complaint. * *

"1. In any action arising upon a contract for the re- "covery of money or damages only; if no answer has "been filed with the clerk of the court within the time "specified in the summons, * * *the clerk on applica-* "*tion* of the plaintiff, made in writing and filed *with the* "*clerk, shall enter the default of the defendant, and imme-* "*diately thereafter enter judgment for the amount speci-* "*fied.* * *"

Prior to the entry of judgment under this statute, there must be the exercise of judicial powers in determining whether the defendant has been duly served with the summons, whether the summons is itself legally sufficient to require the appearance of the defendant, and whether the action is one that comes within the meaning of the statute, together with other questions incidentally involved in these. And the rendering of the judgment itself, both of default and for the amount found by the clerk to be due, is an act made by the statute wholly independent of the judicial officer of the court, the judge, in whom the judicial powers are vested.

THIS STATUTE, IN SO FAR AS IT AUTHORIZES THE CLERK TO RENDER JUDGMENT FOR WANT OF AN ANSWER IS UNCONSTITUTIONAL.

FIRST: BECAUSE IT VESTS JUDICIAL POWERS IN THE CLERK, WHO IS NOT A JUDICIAL OFFICER, AND THUS CONTRAVENES THE CONSTITUTION, WHICH VESTS ALL THE JUDICIAL POWERS IN THE COURTS AND MAGISTRATES THEREIN EXPRESSLY NAMED.

This provision of the Oregon code is taken from the California code, where it apparently originated; and in *Graydon* v. *Thomas*, 3 Oregon, 250, the Supreme court adopts the decision of the California court, and holds that the clerk, in entering a default, *exercises no judicial functions, but acts merely in a ministerial capacity.*

Its exposition of the nature of the clerk's acts in that regard is based upon a very peculiar line of argument. It says, page 252: "The clerk must ascertain from the "complaint that the action is one specified in section 246 of "the code, for money or damages only; and, further, he "must ascertain when and where the summons was "served, and whether the defendant be in *default.* The "laws of this state have invested in the clerk authority to "determine these matters, *as the necessity of a determina-*"*tion of them is a condition precedent* to the exercise of "the further power reposed in him by law to enter the "default, and thereupon to enter judgment for the amount "prayed for in the complaint." This amounts to no more than saying that the clerk has judicial powers vested in him in this regard, because the determination of these questions, *i. e.*, the sufficiency of the complaint, the summons and the service, which are in their very nature questions to be determined by the judicial power, must

be first made, before the ministerial act of entering judgment on the record can be performed.

In this connection it is interesting to note some of the questions which in the cases decided by the Oregon and California courts have been submitted to the clerk for his decision.

In *Trullinger* v. *Todd*, 5 Oregon, 36, the court find that the service of the summons on the defendant was not legally sufficient "to give the court jurisdiction," and therefore judgment entered by the clerk for want of answer, was void.

Smith v. *Ellandale Mill Co.*, 4 Or., 70, presents another error by the clerk in passing on the legal sufficiency of the service of summons.

In *Prov. Tool Co.* v. *Prader*, 32 Cal., 638, the court says: "A paper purporting to be a bill of particulars in 'itself * * having been served more than 10 days "before the application to enter the defendant's default "was made, and *the evidence thereof and the order* of the "judge enlarging the time to answer being on file, *the duty* "*of the clerk was to ascertain from the evidence of record* "*in the case whether the defendant was in default.* * *"

In each case, in fact, these prior questions of law must be determined before judgment can be entered; and it would seem that the decision of these questions must call for the exercise of judicial powers.

In *Stearns* v. *Aguirre*, 7 Cal., 449, the court defines a judgment to be "the decision or sentence of the law, "given by a court or competent tribunal," which "to be "valid must be given by a *competent judge or court* * * "and is usually entered up by the clerk under the super- "vision of the court;" and says that "our statute *has in-*

"*introduced a new rule*, and pronounces a judgment of "law upon a certain state of facts, which, when duly au- "thenticated, authorize the clerk to enter judgment "thereon."

And in *Bond* v. *Pachecho*, 30 Cal., 535, the court further says that "the clerk must necessarily look to the "summons and prayer to ascertain the amount," * * and that, "*to this extent, under the statute, the clerk exer- "cises the functions of the court.*"

That this statute, in so far as it confers upon the clerk the power of rendering a judgment, is unconstitutional, because it violates the provisions of article VII., section 1, of the constitution, is a question that has never been presented to the Supreme court of Oregon. The decision of the court in *Graydon* v. *Thomas*, *supra*, was based entirely on certain California cases; no reference is made to this provision of the Oregon constitution; and the only objection urged was that the clerk usurped the functions of the court, but that was made without raising the constitutional question involved. This branch of the question is therefore open to discussion.

That the clerk of the court was without judicial powers to perform a judicial act, was so evident a proposition, that the Oregon court, in order that it might sustain the validity of judgments rendered by the clerk under this statute, was driven to the position of declaring that such judgments were not judicial acts; that the statute pronounced a judgment, and the clerk merely acted ministerially in entering it. This proposition will not bear examination, in view both of the nature of the judgment itself, and of the preliminary questions which must be determined judicially prior to the ministerial act of entering

the judgment, as shown by the Oregon and California cases above cited.

In contrast with this course of reasoning, which leads to such a singular conclusion, I refer the court to the case of *Hall* v. *Marks*, 34 Ill., 362.

In this case the question involved was identical with that in the case at bar. The constitution of Illinois distributes the powers of the government in the same way as that of Oregon, and vests the judicial powers in certain courts and magistrates. By statute the legislature had conferred on the clerk of the court similar powers to those given by the statute of Oregon.

In passing on the constitutionality of this statute, and the validity of a judgment rendered in accordance with it in the vacation of the court, by the clerk, the court says:

"The power to adjudge, determine and render a judg-
"ment, is beyond all question a judicial act, and under
"this provision (referring to the constitution), can only
"be done by judicial authority. * * * *Before a*
"*default is entered it must be judicially determined that a*
"*sufficient summons had issued and legal service has been*
"*had upon the defendant, and the assessment of damages*
"*belong to the judicial and not the ministerial department of*
"*the court.* * * *The consideration of the facts, and the*
"*application of the law to these facts, and the conclusion*
"*deduced by the court from the law and the facts, constitute*
"*a judgment.* The power to annouce and have enforced
"this conclusion has been confided exclusively to the ju-
"duciary of our state government. * *

"* * It would be a perversion of language to call
"a clerk of a court a judicial officer. He is attached to
"the judicial department, but is only a ministerial officer

"of a court. * * Every order or judgment he can "lawfully enter, is the judicial sentence of the court. He "possesses no power or jurisdiction to render a judgment, "but only to enter it under the express or implied order "of the judge in the exercise of judicial power. * * "*The judgment of default rendered by him in vacation is* "*therefore unauthorized and void.*"

Page 364: "If this judgment may be sustained we are "at a loss to determine what judicial power might not be "rightfully conferred upon the clerks of our courts by "legislative enactments. If he may rightfully enter a "judgment by default, assess the damages and enter final "judgment and awarded execution, we cannot perceive "why the power may not be conferred to determine the "sufficiency of the pleadings, compel the formation of "issues, empanel juries to try issues of every description, "render judgments, and, in a word, perform all the duties "of a judge of the court."

This language of the Supreme court of Illinois is an admirable presentation of the objection which I now make; and to supplement it, I wish merely to say that the judgment in the case at bar illustrates clearly the fact that the clerk in rendering this judgment was performing a judicial act, for it is as such that the plaintiff bases his right to enforce it against the defendant.

SECOND. IF THE CLERK MERELY ACTS IN A MINISTERIAL CAPACITY, AND AS THE AGENT OF THE STATUTE ENTERS JUDGMENT WITHOUT THE INTERVENTION OF THE COURT, THIS STATUTE IS UNCONSTITUTIONAL, BECAUSE IT VIOLATES THE PROVISIONS OF ARTICLE III OF THE CONSTITUTION, WHICH PROVIDES THAT "THE POWERS OF THE "GOVERNMENT SHALL BE DIVIDED INTO THREE SEPAR-

"ATE DEPARTMENTS—THE LEGISLATIVE, THE EXECU-
"TIVE AND THE JUDICIAL; AND NO PERSON CHARGED
"WITH OFFICIAL DUTIES UNDER ONE OF THESE DEPART-
"MENTS SHALL EXERCISE ANY OF THE FUNCTIONS OF
"ANOTHER." * *

"But where only the legislative power is delegated to "one department and the judicial to another, * * * "the assumption of judicial powers by the legislature in "such a case is unconstitutional."

Cooley's Const. Lims., * 175.

The California court, by whose decisions the Oregon court was guided in *Graydon* v. *Thomas*, *supra*, holds, that the clerk acts only in a ministerial capacity, because "the statute authorizes the judgment and the clerk is only "an agent by whom it is written out. * * *" *Kelly* v. *Van Austin*, 17 Cal., 565; and because "the statute has "*introduced a new rule and pronounces a judgment of law* "*upon a certain state of facts.* * *"

Stearns v. *Aguirre*, 7 Cal., 449.

It is on this theory that the Oregon court concludes that the clerk in entering judgment of default acts under this statute in a ministerial capacity only. The statute pronounces the judgment, the clerk enters it.

So far, therefore, as this statute authorizes the clerk to render judgment in a cause independently of, or in the name of, the court, it is unconstitutional, either because it vests judicial powers in officers other than the courts and magistrates named in the constitution, or because it is an assumption of judicial power by the legislature itself. We are indifferent as to which of these violations of the constitution shall serve to condemn it. It is perfectly apparent that the judicial officer of the court (in whom are

vested all judicial powers) is not called upon to act in regard to this judgment. Indeed, section 257, Tit. XV, of this statute, states in so many words: "In the entry of all "judgments *except judgments for want of an answer*, the "clerk shall be subject to the direction of the court."

The law itself being unconstitutional in this regard, a judgment rendered by the clerk in accordance with its provisions, is void for want of jurisdiction over the cause.

(*b.*) *From the theory of the Oregon court, that the clerk is the mere ministerial agent of the legislature in entering on the record the judgment which the statute itself pronounces, and the fact that the judgment when entered is in no sense the act of the judicial officer, there is the further result, that a judgment thus rendered is not a "judicial proceeding" of the state of Oregon within the meaning of the United States constitution, and is not entitled to faith and credit in this court.*

"The term (judicial) when applied to a court of justice, "is limited within a less extended scope, and *those acts are "denominated judicial which properly pertain to the judge "alone in the exercise of his office.*"

Prov. Tool Co. v *Praden*, Cal.,

And COOLEY says, speaking of "judicial proceedings": "They cannot be valid unless they proceed upon inquiry, "and render judgment only after trial."

Const. Lims., * p. 354.

A judicial proceeding must emanate from and be the exercise of the judicial powers. It is only a *the judgment of the court* and a determination by the court of the rights and liabilities of the parties that it is entitled to faith and credit; and when it appears, as in the case at

bar, that it was rendered by the clerk, not by the court, in vacation, not in term time, it loses every possible claim to the title of a "judicial proceeding," or to faith and credit as such.

(*c.*) A JUDGMENT RENDERED BY THE CLERK IN THE VACATION OF THE COURT, WHEN THE JUDICIAL POWERS OF THE COURT EXIST ONLY *in futuro*, IS VOID.

The Oregon constitution provides, article VII, section 8, "that the Circuit court shall be held twice at least in each "year in each county, * * by one of the justices of "the Supreme court, at times to be appointed * * "and at such other times as may be appointed *by the "judges severally* * * in pursuance of law." This Circuit court had met and held its regular May term, and adjourned *sine die* before the plaintiff filed his complaint. It was not in existence until the time appointed by law for the next term should come, or unless some time should be appointed by the judge himself in pursuance of law. Until then, a cause in that court would be *coram non judice;* the judge himself could not exercise the judicial powers of the court.

"To be valid a judicial judgment must be given by a "competent judge or court, *at a time and place appointed "by law.* * * A judgment would be null if the judge "had not jurisdiction of the matter. * * * *Or having "such jurisdiction he exercised it when there was no court "held.*"

Bouvier Law Dict., p. 762.
Freeman on Judgments, Sec. 121.

Indeed, section 888 of the Oregon code provides expressly that "a judge may exercise out of court all the

"powers expressly conferred on the judge *as contradis-*
"*tinguished from a court*, and not otherwise."

The entry of this judgment by the clerk in the vacation of the court is not expressly authorized by the terms of the Oregon statute, which creates this statutory form of judgment. The statute (Chap. II., T. x., section 257) merely provides that the clerk may enter judgment for want of answer, independently of the court, on the application of the plaintiff, and proceeds to state the general form in which a judgment in vacation should be entered. The Oregon court has not passed upon the constitutionality of the statute in this regard, though the question was raised in *Trullinger* v. *Todd*, 5 Or., 39. It found in that case sufficient error in the clerk's *quasi judicial* acts to cause his judgment to be pronounced void, and expressly declined to take up the other question. If, therefore, in despite of the terms of the statute, it could be presumed that during the term the clerk would be acting under the direction of the court, and therefore a judgment rendered by him might be held valid, it would seem certain that in vacation it cannot be a judicial proceeding. On this question there is no attempted decision by the Oregon court, so that it is certainly open to consideration here.

To conclude, therefore, the clerk is not a judicial officer, has no judicial powers, cannot perform a judicial act during the session of the court, and certainly not during its vacation. Any statute of Oregon that may authorize such a proceeding must be unconstitutional; and this alleged judgment was rendered by him without jurisdiction, is not a *judicial proceeding* of the State of Oregon, nor is it entitled to faith or credit in this court, but is absolutely worthless and void.

From the allegations of the declaration itself, it is therefore apparent that the plaintiff's pretended judgment could not be enforced in this court against the property of the corporation itself. It is unnecessary to add, that such being the case, it cannot be made the basis of an action against the defendant in this case.

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